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In the Supreme Court of the United States

OCTOBER TERM, 1980

UNITED STATES OF AMERICA, PETITIONER

v.

JEFFREY R. MACDONALD

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether the Speedy Trial Clause of the Sixth Amendment applies to a period when a person is not under arrest or formal accusation of a crime.

2. Whether respondent's constitutional rights were violated by the delay between the commission of the crime and the return of the indictment.

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The Solicitor General, on behalf of the United States, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. A, *infra*, 1a-27a) is reported at 632 F.2d 258. The opinion and order on denial of rehearing (App. C, *infra*, 29a-49a) is reported at 635 F.2d 1115. The opinion of the district court (App. D, *infra*, 50a-73a) denying respondent bail pending appeal is reported at 485 F. Supp. 1087.

JURISDICTION

The judgment of the court of appeals (App. B, *infra*, 28a) was entered on July 29, 1980. A petition for rehearing was denied on December 18, 1980 (App. C, *infra*, 29a). On February 10, 1981, Justice Brennan extended the time within which to file a petition for a writ of certiorari to and including March 18, 1981. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The Sixth Amendment to the Constitution provides in pertinent part:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy trial * * *.

STATEMENT

Following a jury trial in the United States District Court for the Eastern District of North Carolina, respondent was convicted on one count of first degree murder and two counts of second degree murder, in violation of 18 U.S.C. 1111. He was sentenced to three consecutive terms of life imprisonment. The court of appeals reversed the convictions and ordered dismissal of the indictment on the ground that respondent's Sixth Amendment right to a speedy trial had been violated.

1. When the murders of which he was convicted were committed, respondent was a physician holding the rank of captain in the United States Army Medical Corps and was stationed at Fort Bragg, North Carolina. In the early morning of February

17, 1970, respondent's wife and two daughters were bludgeoned and stabbed to death in respondent's quarters at the Fort Bragg military reservation.[1] Respondent informed the military police that he had been awakened by the screams of family members, and that four unknown assailants had attacked him and knocked him unconscious. The Army Criminal Investigation Division (CID) and other authorities immediately began an investigation of the crime. Shortly after the murders, respondent gave investigating officers a detailed account of his actions upon regaining consciousness and discovering the bodies.

The investigators uncovered a great deal of physical evidence in the apartment. For example, fibers from the pajama top that respondent was wearing on the night of the murders were found in various areas of the apartment. And the fact that each member of the MacDonald family had a different blood type enabled the investigators to identify the source of each blood stain that was found. By April 6, 1970, it became apparent to CID investigators that many aspects of respondent's story were inconsistent with the physical evidence. Accordingly, on that day respondent was advised of his rights and informed that he was a suspect. He was relieved of his medical duties and restricted to quarters. On May 1, 1970, the Army formally charged respondent with murder, pursuant to Article 30 of the Uniform Code of Military Justice (UCMJ), 10 U.S.C. 830.

As required by Article 32 of the UCMJ, 10 U.S.C. 832, an investigating officer was appointed to investigate the charges and to recommend whether they should be referred to a general court-martial for trial. Following the Article 32 hearing, the investigating officer filed a report recommending dismissal of the charges and further investigation by civilian authorities. On October 23, 1970, after review of the report, the Commanding General of respondent's unit accepted the recommendation and dismissed the charges because of insufficient evidence available to justify their reference to trial by court-martial. See *Manual for Courts-Martial, United States* ¶ 33f (rev. ed. 1969). In December 1970, the Army granted respondent an honorable discharge for reasons of hardship. Respondent then moved to California and established himself as a practicing physician (App. D, *infra*, 55a).

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[1] The early background of this case is set out in the decisions rendered before trial. *United States* v. *MacDonald*, 531 F.2d 196, 200-201 (4th Cir. 1976), rev'd, 435 U.S. 850 (1978).

At the request of the Department of Justice the CID continued its investigation. The investigation was quite extensive, involving several hundred interviews and numerous forensic tests of the victims' clothing and other physical evidence found at the crime scene. In June 1972, the CID transmitted to the Justice Department a massive thirteen-volume report recommending still further investigation (435 U.S. at 851). After the raw report had been examined by several persons within the Department, the CID was requested to investigate some undeveloped leads. The CID then conducted more interviews and scientific tests and forwarded supplemental reports to the Department on November 9, 1972, and August 20, 1973. In late May 1974, after further study, the government determined that many unanswered questions in the complex case could be resolved only by use of the investigative powers of a grand jury. Therefore, in August 1974, a grand jury of the United States District Court for the Eastern District of North Carolina was empanelled. On January 24, 1975, the grand jury indicted petitioner on three counts of premeditated murder.

2. Prior to trial, respondent moved to dismiss the indictment on several grounds including double jeopardy and denial of the right to a speedy trial. The district court denied these motions. On the speedy trial question, the court, relying on *United States* v. *Marion*, 404 U.S. 307 (1971), concluded that "[t]he right to a speedy trial under the Sixth Amendment does not arise until a person has been 'accused' of a crime, and in this case this did not occur until the indictment had been returned." See 435 U.S. at 852.

Finding that the issue could properly be appealed before trial, the court of appeals reversed and remanded with instructions to dismiss the indictment on speedy trial grounds. 531 F.2d 196 (1976). The court viewed the preferral of military charges against respondent on May 1, 1970, and the attendant restriction of his movement as "the functional equivalent of a civilian arrest" (531 F.2d at 204). Accordingly, it held that the Sixth Amendment guarantee of a speedy trial attached at that time. Because petitioner remained under suspicion and felt obliged to retain a lawyer after the military charges were dismissed, the court noted that his "freedom from detention" during the years prior to his arrest after indictment "did not, from a practical standpoint, dispel the effects of the government's initial accusation" (*ibid.*). Therefore, the court held that the delay of more than four and one half years between the military accusation and the indictment triggered the balancing analysis outlined in *Barker* v. *Wingo*, 407 U.S. 514 (1972), for violations of the Sixth Amendment right to a speedy trial.

Applying the *Barker* analysis, the court of appeals conceded that the government had not deliberately delayed charging respondent in order to hamper the defense (531 F.2d at 205-206). However, the court found that the government had provided no satisfactory explanation for the delay between the transmittal of the CID report to the Department of Justice in June 1972 and the empanelling of the grand jury in August 1974; instead this delay was ascribed to "indifference, negligence, or ineptitude" (531 F.2d at 207). The court also stated that respondent "reasonably asserted his right to a speedy trial" (*ibid.*). Finally, the court found that respondent had been prejudiced by the delay because of the need to retain counsel, the anxiety produced by the threat of a new prosecution, and the expectation that "in the five years since the murders, memories have faded and witnesses can no longer be expected to reliably recall details" (*id.* at 207-208). The court concluded that a weighing of these factors indicated a violation of respondent's Sixth Amendment right to a speedy trial (*id.* at 208).

Judge Craven dissented (531 F.2d at 209-214). He reasoned that because the military charges against respondent had been dismissed in October 1970, and because respondent had "stood under no 'public accusation'" during the four-year period prior to the indictment, the majority's conclusion that respondent's right to a speedy trial continued unabated from May 1970 until the return of the indictment in January 1975 was incorrect (*id.* at 212-213). Judge Craven viewed respondent's claim as one alleging a violation of due process as a result of pre-indictment delay, which he found unsupported by evidence of actual prejudice (*id.* at 214).[2]

After the Fourth Circuit denied a petition for rehearing en banc by a 3-3 vote, this Court granted certiorari. The Court reversed on the ground that an interlocutory appeal may not be taken from the denial of a motion to dismiss on speedy trial grounds. 435 U.S. 850 (1978). In light of its holding on the appealability issue, the Court did not reach the government's contention that the court of appeals had erred in applying the protections of the Sixth Amendment to the entire period from the military accusation to the indictment. 435 U.S. at 863 n.9. On remand, the court of appeals held that a trial on the federal indictment would not violate the Double Jeopardy Clause. 585 F.2d 1211 (1978).

3. After respondent's trial and conviction by a jury, he moved to vacate the conviction and dismiss the indictment on speedy trial grounds. The district court denied this motion (App. E, *infra*, 74a-75a), setting forth its reasons in a decision denying respondent bail pending appeal (App. D, *infra*, 50a-73a). First, the court pointed out that respondent

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[2] Judge Craven also disputed the majority's conclusion that respondent had been subject to the civilian equivalent of arrest as the result of the preferral of military charges and his restriction to quarters. He reasoned that, although a probable cause determination is a prerequisite to an arrest as the term is used in the Sixth Amendment context, no such determination is necessary for preferral of charges under military law. Judge Craven concluded that the Army's inquiry fell "somewhere between an unsuccessful presentation to a grand jury and an arrest and subsequent release because of a failure to demonstrate probable cause for the arrest," neither of which warrants invocation of the Sixth Amendment's speedy trial guarantee. 531 F.2d at 210-213.

had suffered neither "oppressive pretrial incarceration" nor "great anxiety and concern" because of the pre-indictment delay in that he had spent the majority of the period establishing himself in the practice of medicine in California (*id.* at 54a-55a). Then, noting that it had paid specific attention during the trial to the possibility of prejudice to the defense because of the delay (*id.* at 53a), the court stated that "[t]he fears expressed by the Fourth Circuit in its 1976 decision that [respondent's] ability to defend the case adequately might be seriously prejudiced by the pre-indictment delay have not been borne out in the record developed at trial" (id. at 55a).[3] In the absence of any prejudice, the court concluded that respondent's speedy trial claim should be denied.

A divided court of appeals reversed (App. A, *infra*, la-27a). The court explicitly adopted the reasoning of the first panel with respect to three of the *Barker* factors—the length of the delay, the reason for the delay, and respondent's assertion of his speedy trial right (*id.* at 4a). It went on to discuss each of these factors briefly. The court emphasized that the "military arrest" of respondent triggered his speedy trial right and thus that the relevant delay was the entire period between "the military arrest and trial" (*ibid.*). The court noted, however, that the "most offending delay" was the two-year period between the transmission of the CID report to the Justice Department and the institution of the grand jury proceeding (*id.* at 8a). The court characterized this delay as the product of "sheer bureaucratic indifference" (*id.* at 7a).

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[3] Specifically, the court observed that the only material witness who died during the delay was a government witness, that several witnesses "vital to the defense" would have been either unknown or unavailable if the trial had been conducted shortly after commission of the offense, and that respondent had not alleged any particular in which his defense was prejudiced by the delay (App. D, *infra*, 55a-56a).

Turning to the question of prejudice to the defense at trial, the court noted that "[t]he substantial possibility of prejudice is what controls; it is not incumbent on the defendant to prove that prejudice inescapably took place" (App. A, *infra*, 11a). Citing the "almost certain memory erosion" of the witnesses (*id.* at 14a) and the difficulty that respondent would have had, in light of the nine-year delay,[4] in testing the consistency of prosecution witnesses' trial testimony with their original statements, given the risk that the prosecutors had bolstered their recollection in preparing for trial (*id.* at 10a), the court concluded that there was a "substantial possibility that [respondent's] defense was prejudiced by the delay" (*id.* at 14a). In particular, the court noted that the testimony of Helena Stoeckley, a defense witness, "had a great potential for prejudice" (*id.* at 11a). Stoeckley had made vague and contradictory remarks to third parties on several occasions in the past that indicated that she was present in respondent's apartment during the murders, but had testified at trial, consistent with other earlier statements that she had made, that her mind was essentially blank as to her activities on the night of the murders. Although the court acknowledged that, within a week of the murders, Stoeckley had told a neighbor that she had no recollection of her activities on the night of the crime and that, "[h]er memory has resembled a lightbulb not screwed tight, blinking on and off" (*id.* at 13a), it concluded that the possibility, indeed the probability, that unreasonable delay was the cause [of Stoeckley's memory gap] cannot be excluded" (*id.* at 13a-14a). The court then noted that the amount of trial prejudice necessary to demonstrate a speedy trial violation depends on the other *Barker* v. *Wingo* factors. Balancing all of those factors, the court of appeals concluded that respondent's Sixth Amendment rights had been violated (*id.* at 16a-17a).

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[4] The court acknowledged that not all of the nine-year delay was attributable to the government, but nonetheless remarked that "all of it contributed to the fading of memories" (App. A, *infra*, 10a n.2).

Judge Bryan dissented. First, he disputed the court's view that the lapse of time between the commission of the crime and the indictment was inexcusable. In light of the complexity of the case, Judge Bryan found that the deferral of the submission of the case to the grand jury was "well advised" (App. A, *infra*, 21a). Both the government's interest in the investigation and considerations of fairness to the respondent dictated that a grand jury not be convened until the government had gleaned all available evidence (*id.* at 21a-22a). Judge Bryan also rejected the court's conclusion regarding prejudice at trial, finding that respondent's ability to defend himself was in no way prejudiced by the delay (*id.* at 23a-27a).[6]

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[6] Focusing specifically on witness Stoeckley's inability to recall her activities on the night of the murders, Judge Bryan observed that she had testified that her memory gap resulted from her consumption of large quantities of drugs that night, and that the statements concerning the murders that she had made during the intervening years were "vague, fragmented and contradictory" (*id.* at 26a). Thus, the record in no way indicated that the passage of time had weakened Stoeckley's recollection of the events of February 17, 1970; rather, her own testimony indicated "a pre-existing gap in her ability to recount those events" (*id.* at 26a-27a & n.5).

4. The Fourth Circuit denied the government's petition for rehearing en banc by a 5-5 vote. Chief Judge Haynsworth dissented with a brief statement and Judges Russell, Widener, Hall and Phillips filed a fuller dissenting opinion (App. C, *infra*, 29a-47a). In that opinion, the dissenting judges focused on what they deemed the panel's error in including as relevant to the Sixth Amendment inquiry the period between the dismissal of military charges against respondent in October 1970 and his indictment in January 1975. During this period, the dissent explained, respondent was not under arrest, indictment or any other form of legal accusation and thus there was no hearing or other proceeding pending that he could demand be held speedily; in short, "there was nothing to which a claim for a speedy trial could attach" (*id.* at 33a). Citing decisions of other courts of appeals on this point, the dissent concluded that a Sixth Amendment speedy trial claim cannot be predicated upon delay that occurs when a defendant is not subject to any restraint or legal accusation. Rather, if a defendant is prejudiced by such a delay, his claim is one of violation of due process under the Fifth Amendment (*id.* at 38a-39a).

The dissenters went on to address the Sixth Amendment question on the assumption, *arguendo*, that the panel had correctly identified the relevant period of delay. First, they concluded that, in light of the complexity of the case and the need to proceed with great care so as not to absolve a guilty party or unfairly charge an innocent party, the government was not guilty of excessive delay in beginning the prosecution (App. C, *infra*, 41a-44a). Second, with respect to the prejudice resulting from the delay, the dissenters explained that respondent had not suffered oppressive pretrial incarceration nor any anxiety different from that suffered by any person under criminal investigation nor, as explained in Judge Bryan's dissent, any prejudice to his defense as a result of the pre-indictment delay (*id.* at 45a-46a).

Chief Judge Haynsworth expressed his "tentative agreement" with the government's contention that the period between the dismissal of the military charges against respondent and the return of the indictment is irrelevant for Sixth Amendment purposes (App. C, *infra*, 29a-30a). Judge Murnaghan, author of the panel opinion, filed a statement (*id.* at 48a-49a) clarifying that the panel considered in its Sixth Amendment analysis only the delay prior to the January 1975 indictment; it was conceded by respondent that the delay between the indictment and trial was not the responsibility of the government. See App. A, *infra*, 19a n.2; 531 F.2d at 202.

REASONS FOR GRANTING THE PETITION

1. This case presents an important and recurring question concerning the scope of the Sixth Amendment guarantee of a speedy trial. The court of appeals' inclusion in its speedy trial calculations of the period from October 1970 to January 1975, during which time respondent was not under arrest, indictment, or any other legal restraint, seriously misconstrues this Court's decisions in *United States* v. *Marion*, 404 U.S. 307 (1971), and *Dillingham* v. *United States*, 423 U.S. 64 (1975), and conflicts with decisions of several other courts of appeals. Moreover, the court of appeals' decision, if allowed to stand, will have a substantial detrimental impact upon the effective administration of the criminal laws by inhibiting prosecutors from exploring all avenues of inquiry, both

favorable and unfavorable to a suspect, before proceeding with criminal charges.

a. In *United States* v. *Marion, supra,* and *Dillingham* v. *United States, supra,* this Court held that the right to a speedy trial guaranteed by the Sixth Amendment is activated only by a formal accusation of a crime, either by indictment, information, or arrest. As was explained in *Marion* (404 U.S. at 320; emphasis supplied):

> Arrest is a public act that may seriously interfere with the defendant's liberty, whether he is free on bail or not, and that may disrupt his employment, drain his financial resources, curtail his associations, subject him to public obloquy, and create anxiety in him, his family and his friends. * * * So viewed, it is readily understandable that it is either a formal indictment or information or else the actual restraints imposed by arrest and *holding to answer a criminal charge* that engage the particular protections of the speedy trial provision of the Sixth Amendment.

See also 404 U.S. at 321 & n.13; *United States* v. *Lovasco,* 431 U.S. 783, 788-789 (1977). It necessarily follows from this rationale that the right to a speedy trial is not implicated during the period after charges against an accused have been dismissed and he has been released from custody. At that point, he no longer stands under public accusation or suffers interference with his liberties. And there can be no Sixth Amendment obligation speedily to try a person when there are no charges pending against him that can be brought to trial.[6]

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[6] Thus, in *Dillingham* v. *United States, supra,* the Court ruled that the protections of the Speedy Trial Clause were implicated during a period when charges were pending

The decision of the court of appeals abandons these settled principles in applying the Sixth Amendment to the period after the dismissal of the military charges against respondent in October 1970, even though he was honorably discharged from the military and was free from any restraints on his liberty during this period. The only justification given in any of the opinions of the court of appeals for the inclusion of this period is the fact that respondent remained under suspicion for the crime and therefore suffered anxiety that he might be prosecuted and the continuing expense of retaining counsel. See 531 F.2d at 204; see also App. C, *infra*, 49a (statement of Murnaghan, J., on petition for rehearing). These same considerations, however, are equally present where a person who has not been arrested or indicted knows that he is the subject of a serious criminal investigation. Nonetheless, the Court in *Marion* expressly declined to extend the Sixth Amendment's protection to such a situation. 404 U.S. at 321. Treating the consequences of investigation as equivalent to those of a formal accusation obliterates the very distinction drawn in *Marion*. See *United States* v. *Elsbery*, 602

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against the defendant after his arrest, even though he had not yet been indicted. The importance of the fact that the defendant in *Dillingham* was at all times subject to outstanding charges was highlighted in the government's memorandum in that case (No. 74-6738). Although we conceded that the court of appeals there appeared to have misapplied *Marion* in failing to consider the delay between arrest and indictment (at 4-7), we noted in addition (at 7 n.5):

> Of course, if the complaint had been dismissed and petitioner had subsequently been indicted, the period between those two events, during which no charges were outstanding, would not be includable in the period of delay for purposes of the speedy trial analysis.

F.2d 1054, 1059 (2d Cir.), cert. denied, 444 U.S. 994 (1979).

In rejecting the clear implication of *Marion*, the court below reached a result that directly conflicts with decisions of other courts of appeals. In *United States* v. *Martin*, 543 F.2d 577 (6th Cir. 1976), cert. denied, 429 U.S. 1050 (1977), the defendant was charged with an offense in August 1972, but those charges were dismissed in January 1973. He was subsequently indicted in December 1974. In rejecting the defendant's claim that his Sixth Amendment right to a speedy trial had been denied, the court stated (543 F.2d at 579): "Because there was no indictment which could have been tried in the period between January 1973 and December 1974, we cannot say that a speedy trial was delayed during that time."

Similarly, in *United States* v. *Bishton*, 463 F.2d 887 (D.C. Cir. 1972), the defendant was reindicted on federal charges after the initial charges against him brought under District of Columbia law had been dismissed on jurisdictional grounds. In rejecting the claim that the defendant's right to a speedy trial had been violated, the court declined to consider for speedy trial purposes the period after the first prosecution had been terminated but before the second had begun. Noting that "during this time appellant was a free man against whom no prosecution was pending," the court concluded that "[w]hen a citizen stands neither arrested nor indicted for an offense, he 'suffers no restraints on his liberty and is not the subject of public accusation; his situation does not compare with that of a defendant who has been arrested and held to answer.' United States v. Marion, [404 U.S.] at 321." 463 F.2d at 891. And, in analogous cases, the Second, Ninth and Tenth Circuits have also expressed the view that the relevant speedy trial period does not run uninterrupted from the time of institution of charges, when the initial charges are subsequently dismissed. *United States* v. *Hillegas*, 578 F.2d 453, 457-458 (2d Cir. 1978);[7] *Arnold* v. *McCarthy*, 566 F.2d 1377, 1383 (9th Cir. 1978);[8] *United States* v *Stoker*, 522 F.2d 576, 579-580 (10th Cir. 1975).[9]

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[7] *Hillegas* technically involved the application of the district court's local prompt disposition rules rather than the Sixth Amendment. The court of appeals explicitly noted, however, that those rules "seek to implement the accused's constitutional right to a speedy trial," and therefore that it was "constrained by the admonition [in *Marion*] that 'it is either a formal indictment or else the actual restraints imposed by arrest and holding to answer a criminal charge that engage the particular protections of the speedy trial provision of the Sixth Amendment.' " 578 F.2d at 457. Thus, it is clear that the court's analysis with respect to the period between dismissal of the complaint and reindictment is fully applicable to cases such as this one and would necessitate a result contrary to the one reached by the court below. See also *United States* v. *McClean*, 528 F.2d 1250, 1258 (2d Cir. 1976); *United States* v. *Flores*, 501 F.2d 1356, 1359-1360 (2d Cir. 1974).

[8] The Ninth Circuit has since suggested that *Arnold*, which involved the period between a mistrial and a later reindictment, would not necessarily be controlling where the dismissal of the original charges does not follow the declaration of a mistrial. *United States* v. *Henry*, 615 F.2d 1223, 1233 n.13 (1980).

[9] The Fourth Circuit is not completely alone in its view that a period when no charges are pending may be relevant in computing the length of delay for speedy trial purposes. At least where a second indictment charges the same offense, the Fifth Circuit has stated that the period relevant to a speedy trial calculation dates from the return of the first indictment. *United States* v. *Nixon*, 634 F.2d 306, 309 (5th Cir. 1981); *United States* v. *Avalos*, 541 F.2d 1100, 1108-1109 n.13 (5th Cir. 1976), cert. denied, 430 U.S. 970 (1977).

b. In addition to the conflict created among the circuits, the decision below will have a substantial adverse impact on the administration of the criminal justice system. As this Court pointed out in *United States* v. *Lovasco, supra*, 431 U.S. at 791-796, there are sound reasons for not requiring a prosecutor to file criminal charges as soon as probable cause is established to his satisfaction, or, indeed, even when he believes that he has assembled sufficient evidence to prove guilt beyond a reasonable doubt. By the same token, there are a variety of legitimate reasons for dismissing charges after a person has been arrested. The government may decide not to pursue the case because subsequent and considered judgment determines that the evidence, although it establishes probable cause, may not be sufficient to persuade a jury of guilt beyond a reasonable doubt; or something may occur that alters the basis for the original decision to file charges, such as a witness becoming unavailable or new evidence coming to light; or other, non-evidentiary factors may indicate that a criminal proceeding would not be in the public interest. Cf. *United States* v. *Lovasco, supra*, 431 U.S. at 793-794. Such dismissals are beneficial to both the defendant and the government. A defendant is released from a pending charge and its attendant anxiety, expense and infringement of liberty. The government is given an opportunity to continue its investigations and to reassess its decision not to prosecute if new evidence is discovered.

Under the court of appeals' decision that a defendant's speedy trial rights, once triggered by an arrest

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But see *United States* v. *Davis*, 487 F.2d 112, 116 (5th Cir. 1973), cert. denied, 415 U.S. 981 (1974) (*Barker* v. *Wingo* speedy trial analysis applied only to delay after the return of the second indictment).

or formal charge, continue to run despite a dismissal of the charges, such dismissals will be discouraged. Prosecutors will be induced to bring cases to trial to avoid the risk of dismissal on speedy trial grounds even when it might otherwise be appropriate to dismiss the charges pending further investigation. The consequence will be that, in some cases, persons will be brought to trial who would never have been tried at all if an investigation had been given time to run its course. In other cases, guilty defendants will be acquitted because of the government's inability in the short time after arrest to develop compelling proof of guilt. Even if the prosecutor does elect to dismiss the charges in order to develop additional evidence, the investigation will have to be conducted in a hurried atmosphere. Moreover, law enforcement officials will be dissuaded from reopening cases in light of the discovery of new evidence of guilt, even though prosecution would not be barred by the statute of limitations, because of a fear that a conviction would not stand in the face of a speedy trial claim based upon charges long ago dismissed.[10]

2. The conclusion that the Sixth Amendment is not implicated by the delay between the dismissal of the military charges and the return of the indictment does not leave unfair prosecutorial delay beyond judicial scrutiny. Rather, the correct analysis is

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[10] We note in this connection that there is no period of limitations applicable to the grave offenses with which respondent was charged. 18 U.S.C. 3281. See *United States* v. *Provenzano*, 423 F. Supp. 662, 664-666 (S.D.N.Y. 1976), aff'd, 556 F.2d 562 (2d Cir. 1977) (where statute provides for death penalty, 18 U.S.C. 3281 applies even though death penalty cannot constitutionally be imposed) (dictum). Nevertheless, the indictment here was returned within five years from the date of the slayings.

under the Due Process Clause of the Fifth Amendment. As this Court has explained, a lengthy delay prior to accusation violates the Fifth Amendment if it both causes actual prejudice to the defense and is the product of fundamentally unfair government conduct—for example, if the delay is an intentional device to gain a tactical advantage over the accused. See *United States* v. *Lovasco, supra*, 431 U.S. at 788-796 & n.17; *United States* v. *Marion, supra*, 404 U.S. at 324; see also, *e.g., United States* v. *Elsbery, supra*, 602 F.2d at 1059. Thus, a subsidiary question is presented here whether respondent's constitutional rights were violated by the pre-indictment delay—either under the Fifth Amendment or, if contrary to our contention the period during which no charges were pending is counted for speedy trial purposes, under the Sixth Amendment.[11]

Although the court below did not explicitly consider the applicability of the Fifth Amendment (App. A, *infra*, 2a), we think it clear from the record and from the opinions below that respondent's due process rights were not violated by the delay; indeed, we submit that, even assuming *arguendo* that the court of appeals was correct in including the total pre-indictment delay in the Sixth Amendment analysis, the delay here does not constitute a speedy trial violation under the standards set out in *Barker* v. *Wingo*, 407

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[11] There can be little doubt that, unless this period is counted against the government, there is no Sixth Amendment violation here. The period between the preferral of the military charges and their dismissal is too short to trigger the Sixth Amendment analysis. The delay between indictment and trial, as respondent has always conceded (see 531 F.2d at 202), was not the fault of the government but rather was caused by respondent's pretrial appeals.

U.S. 514 (1972).[12] First, as both dissents below pointed out (App. A, *infra*, 21a-22a; App. C, *infra*, 41a-44a), the government was pursuing its investigation during this period and, in light of the complexity of the case and the desire not to charge an innocent party, its delay in seeking an indictment was justified. Second, as the dissenters and the district court found (App. A, *infra*, 23a-27a; App. C, *infra*, 45a-46a; App. D, *infra* 55a), respondent has not demonstrated any significant possibility that his defense at trial was prejudiced by the delay. No potential defense witness became unavailable to testify at trial as a result of the delay.[13] Moreover, the evidence on which respondent was convicted consisted "solely of highly technical circumstantial evidence" (App. A, *infra*, 16a). The reliability of such evidence does not diminish over time, nor does the ability of defense experts to challenge its significance.

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[12] As Judge Craven's dissent in the Fourth Circuit's first opinion (531 F.2d at 209-214) points out, the threshold determination that respondent's speedy trial right attached when he was charged by the military and restricted to quarters in May 1970 is not free from doubt. Assuming that the Sixth Amendment speedy trial guarantee applies to military court-martial proceedings (cf. *Ex parte Quirin*, 317 U.S. 1, 40 (1942)), it is not clear that respondent was "arrested" within the meaning of *Marion* and *Dillingham*. No probable cause determination was necessary in order to prefer charges against him. See 531 F.2d at 211-212; Article 30 of the UCMJ, 10 U.S.C. 830. Moreover, the restriction on respondent's liberty was not equivalent to pretrial restraint in the civilian context. Although he was restricted to his room in a bachelor officer's quarters and relieved of his duties as a medical officer, he was not taken into custody and was allowed considerable freedom of movement. See 531 F.2d at 213 & n.16. We are not, however, seeking review of this narrow issue, and we assume for the purpose of this petition that the protections of the Sixth Amendment were triggered when respondent was charged in May 1970.

[13] The assertion of the court below that the delay probably caused defense witness Stoeckley's failure to testify that she was present at the murders does not withstand analysis. Nothing in the record supports the remarkable suggestion

It follows, *a fortiori*, that the pre-indictment delay here did not violate due process. Even giving the court of appeals' opinion the reading most favorable to respondent, it is manifest that no Fifth Amendment violation can be established under the standard of *United States* v. *Lovasco*, *supra*. The court of appeals pointed only to possibilities of prejudice to the defense at trial; it implicitly conceded that no actual prejudice had been shown (see App. A, *infra*, 11a, 16a). With respect to the reasons for the delay, it has never been suggested that the government deliberately delayed seeking an indictment in order to gain a tactical advantage over the defense (see 531 F.2d at 205-206). Even assuming that part of the delay was attributable to "negligence" (531 F.2d at 207) or "bureaucratic indifference" (App. A, *infra*, 7a), the government's action manifestly did not violate "those 'fundamental conceptions of justice which lie at the base of our civil and political institutions,' * * * and which define 'the community's sense of fair play and decency.'" *United States* v. *Lovasco*, 431 U.S. at 790. Accordingly, neither of the prerequisites

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that the mere passage of time could erase the memory of so significant an event as being present at these murders. On the contrary, as Judge Bryan explained (App. A, *infra*, 26a-27a), the record reveals that, less than a week after the crime, Stoeckley was unable to remember where she had been on the night of the murders; her testimony at trial was the result of a pre-existing gap in her memory that had nothing to do with the delay.

to a finding of a due process violation by reason of pre-indictment delay—actual prejudice or unfair delay—is present here.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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MARCH 1981

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 79-5253

UNITED STATES OF AMERICA, APPELLEE

vs.

JEFFREY R. MACDONALD, APPELLANT

Appeal from the United States District Court for the Eastern District of North Carolina, at Raleigh

Franklin T. Dupree, Jr., Chief Judge

Argued: February 5, 1980 Decided: July 29, 1980

Before BRYAN, Senior Circuit Judge; MURNAGHAN and SPROUSE, Circuit Judges.

MURNAGHAN, Circuit Judge:

Jeffrey R. MacDonald appeals convictions for second degree murder of his wife and one of his children and first degree murder of his other child. He has raised a number of issues as to the conduct of the trial and the rulings at trial by the district judge. He has also contended that his Sixth Amendment guarantee of speedy trial had been violated, and that there was delay so inexcusable and prejudicial as to have denied him the due process mandated by the Fifth Amendment.

Deciding as we do that MacDonald is correct on his Sixth Amendment contention, we do not reach the district judge's conduct and rulings at trial or the Fifth Amendment issue. With respect to the district judge's conduct and rulings at trial, it suffices to note that the case was a sensational, drawn-out one, both hotly contested and bristling with difficult issues. The district judge's handling of the heavy demands placed on him was admirable.

MacDonald's due process contention would require a demonstration that the delay was inexcusable and that actual prejudice occurred. *United States* v. *Lovasco*, 431 U.S. 783 (1977). The requisite proof to make out a Sixth Amendment violation is no greater, and, if anything, on the facts of this case would be less, than that required to establish a Fifth Amendment violation. Under either amendment, unreasonable delay, covering essentially the same time frame must be shown. The presence of the probability of prejudice completes the necessary proof under the Sixth Amendment; the actuality of serious prejudice must be made out to validate a claim of denial of due process. Consequently, as the burden on MacDonald to show an abuse of constitutional proportions under the Sixth Amendment could not be greater than his burden under the Fifth Amendment, there is no occasion to address the due process argument.

The Supreme Court in recent years has provided specific criteria for the balancing tests necessary to determine a Sixth Amendment speedy trial issue. In *Barker* v. *Wingo*, 407 U.S. 514 (1972), the Court said:

> We can do little more than identify some of the factors which courts should assess in determining whether a particular defendant has been deprived of his right. Though some might express them in different ways, we identify four such factors: Length of delay, the reason for the delay, the defendant's assertion of his right, and prejudice to the defendant.

Id. at 530.

In the same opinion, the Court identified three of the interests against which prejudice is measured:

> This Court has identified three such interests: (i) to prevent oppressive pretrial incarceration; (ii) to minimize anxiety and concern of the accused; and (iii) to limit the possibility that the defense will be impaired. Of these, the most serious is the last, because the inability of a defendant adequately to prepare his case skews the fairness of the entire system.

Id. at 532.

On MacDonald's Sixth Amendment claim, we do not write on a clean slate. Prior to trial, MacDonald took an interlocutory appeal, and succeeded on the speedy trial issue, only to have the victory evaporate when the Supreme Court determined that, procedurally the matter was not ripe for review prior to trial. *United States* v. *MacDonald*, 531 F.2d 196 (4th Cir. 1976) (opinion by Butzner, J., joined by Russell, J; Craven, J., dissenting), *reversed on prematurity grounds*, 435 U.S. 850 (1978), [hereafter *MacDonald, First*].

Now, following trial and conviction, we are called upon again to address the question answered in MacDonald's favor by this Court in 1976.

The United States advances the argument that all of the criteria announced in *Barker* must be viewed in a different light from that in which the criteria were considered in this Court's 1976, *MacDonald, First* opinion. The reason, it contends, is that there has been a jury trial in the interim and the facts developed at trial bear on the issues created by the four *Barker* factors.

The United States is only partially correct. The questions necessarily posed by the first three *Barker* factors were in the same posture both before and after trial. It is only the fourth factor, the question of prejudice, that must be viewed differently.

Since the Court's admirable resolution of these issues has not been affected by the facts developed at the intervening trial, we adopt the reasoning of *MacDonald, First* on the issues concerning the effect of the length of delay; the government's reason for the delay; and MacDonald's assertion of his right.

Length of Delay

The offending delay imposed by the government was not the time between the indictment and trial, but the lapse of time between the military arrest and trial. The military arrest was equivalent to civilian arrest and MacDonald was "subjected to 'actual restraints imposed by arrest and holding to answer a criminal charge.' " 531 F.2d at 204. It is inconsequential that the delay was the result of the accumulative action by a military and a civilian arm of government. "The sixth amendment, we hold, secures an accused's rights to a speedy trial against oppressive conduct by the government in its single sovereign capacity, regardless of the number and character of the executive departments that participate in the prosecution." *Id.*

The government argues that *MacDonald, First* was incorrect in stating that a 13-volume report of the Army's Criminal Investigation Detachment forwarded by the CID to the Justice Department in June, 1972, was accompanied by a recommendation of prosecution. However, the United States Attorney for the Eastern District of North Carolina made the recommendation that the matter be submitted to a grand jury within six months of June, 1972, yet nothing occurred until presentation to a grand jury began in August, 1974. In the interval the CID filed two supplemental reports analyzing the significance of physical evidence recovered at the scene of the crime on or shortly after February 17, 1970, the date of the tragic occurrence. The CID had balked at a request by the Justice Department for an additional investigation, suggesting instead the convening of a grand jury.

Viewing the situation as a whole, the unwarranted bureaucratic delay which *MacDonald, First* found had taken place is fully established regardless of the fact that suggestion of grand jury presentation came from the CID, not in June 1972, but at some later time. The Justice Department was in possession of all the evidence from June 1972, and that is what is determinative as to the excessiveness of delay, not whether it had advice from some other government agency to take the step which is committed to it by law, and for which it is particularly equipped to make the requisite decision.

The government also has argued that the reasoning of Judge Butzner's opinion in *MacDonald, First*, may not stand in light of the subsequent holding by the Supreme Court in *United States* v. *Lovasco*, 431 U.S. 783 (1977). However, that case involved facts different in a determinative way from those presented in the instant case. Lovasco's involvement in crime came to the government's attention almost immediately, just as in MacDonald's case. Yet there are two vital distinctions. First, a postal inspector's report was prepared linking Lovasco to the offenses one month after they were committed. In MacDonald's case over two years elapsed before the CID completed its report and forwarded it to the Justice Department. Seventeen months after the postal inspector's report was prepared, Lovasco was indicted. Prior to that time, there had been no arrest, no attendant publicity prior to the indictment. Thus, there was a second distinction of controlling importance between Lovasco's case and MacDonald's. MacDonald had been subjected to the interference with his life and affairs of the Army's arrest and investigation under conditions of extremely intrusive publicity. Lovasco was put to no similar interference prior to his indictment. As a consequence, the Supreme Court held in *Lovasco* that there was presented no viable speedy trial claim under the Sixth Amendment,[1] and turned its attention solely to the alternative assertion: that due process guaranteed by the Fifth Amendment had been denied. In MacDonald's case there was the kind of "arrest and holding to answer a criminal charge" which brings the Sixth Amendment into play. 531 F.2d at 202-04.

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[1] The Supreme Court stated: "In *United States* v. *Marion*, 404 U.S. 307 (1971), this Court considered the significance, for constitutional purposes, of a lengthy preindictment delay. We held that as far as the Speedy Trial Clause of the Sixth Amendment is concerned, such delay is wholly irrelevant, since our analysis of the language, history, and purposes of the Clause persuaded us that only 'a formal indictment or information or else the actual restraints imposed by arrest and holding to answer a criminal charge . . . engage the particular protections' of that provision. *Id.* at 320." 431 U.S. at 788-89.

Thus, pre-indictment delay was deemed altogether irrelevant under the Sixth Amendment in *Lovasco*, whereas, being post-arrest in MacDonald's case, as well as pre-indictment, it is relevant. But, if the 17 month delay in *Lovasco* had been relevant, it was far more excusable than the delay of over two years in MacDonald's case. The latter was the product of sheer bureaucratic indifference and therefore weighs heavily against the government. In Lovasco's case there were other persons, whose involvement was evident, and whose likely criminality was apparent. Delay to explore possibilities of bringing the others to book contemporaneously with Lovasco was excusable. The investigation was properly describable as incomplete, and the Supreme Court accepted that the need for more investigation and the actual conduct of more investigation were established. In MacDonald's case, on the contrary, no further investigation was undertaken. Internally, the government conducted tests on evidence already long since obtained at the scene of the crimes, and lawyers in the Justice Department vacillated over and postponed decision on whether to seek indictment.

As did the *MacDonald, First* panel, we conclude, therefore, that the delay in MacDonald's case is sufficiently long to justify "inquiry into the other factors that go into the balance of assessing MacDonald's claim that he has been denied a speedy trial."

The Reason for the Delay

For eighteen months after the dismissal of the charges by the Army, the CID, at the request of the

Justice Department, conducted another extensive investigation. The report was transmitted to the Department of Justice in June, 1972, more than two years before the commencement of grand jury proceedings. The primary reason for the two-year delay was either a disagreement between two groups in the Justice Department as to whether the case should be prosecuted, or just simple government bureaucracy (the contention of the involved Assistant U. S. Attorney). This latter two years is the most offending delay and certainly weighs heavily against the government in determining whether MacDonald's right to a speedy trial has been violated.

The Defendant's Assertion of His Right

There is no question but that MacDonald vigorously pursued his right to a speedy disposition of the charges against him. He gave statements to the CID while still in the military and testified under cross-examination at the military hearing. He waived immunity and testified before the grand jury when it was finally convened, and consistently, after his discharge, contacted the Justice Department in an attempt to expedite the resolution of his case. This is entitled to strong evidentiary weight in determining whether he has been deprived of his right to a speedy trial. *Barker, supra,* 407 U.S. at 532.

Prejudice—The Fourth Barker *Factor*

The question of prejudice is, of course, viewed from a crucially different perspective after the trial of the case than was available prior to trial. Completed evidence presents a detailed picture from which the possibilities of prejudice can be gauged. "As is reflected in the decisions of this Court, most speedy trial claims, therefore, are best considered only after the relevant facts have been developed at trial . . . . Before trial, of course, an estimate of the degree to which delay has impaired an adequate defense tends to be speculative. . . ." *U. S.* v. *MacDonald,* 435 U.S. 850, 858 (1978).

It is a rare case, however, where testimony will simplistically demonstrate that the defense has been hampered by the passage of time. The MacDonald prosecution and defense is no exception. The evidence at trial, if anything, confused rather than clarified the question of actual prejudice at trial. As a reviewing court, our task has been to carefully sift the record and balance the evidenced effects of delay with the other "speedy trial" rules of *Barker* and its progeny.

It has been urged that *MacDonald, First* misconceived the significance of certain physical evidence obtained at the murder scene: a flower pot, MacDonald's pajama top and a coffee table. It is further insisted that, judging by what actually occurred at trial, and not by what was anticipated would occur at trial, those items were not utilized by the government in a manner unfairly prejudicial to MacDonald when the case was presented to the jury. However, those particular items were alluded to as "but examples of the many questions about physical evidence that the government's case turns on." 531 F.2d at 208. The particular differences between pre-trial expectations and the actualities of trial are insignificant in the total picture.

The government has contended that pre-trial concerns about the prejudice to MacDonald from the fading memories of witnesses and the necessity for them to rely on statements made half a decade previously have proved groundless in the actual event. The prosecutor, the contention runs, did not need to refresh recollections at trial by resort to the earlier-obtained witness statements. However, that is no adequate response. The risk to MacDonald was simply too great that, in preparations *prior to the testifying* of each witness, the prosecutors helped fill lacunae of recollection, and assured consistency of support for their theory of the case by reminding each witness of what he had said at the outset. The intervening period of over nine years rendered it virtually impossible for MacDonald to prove the recollections of each witness to see if they were fuller than or different from what he had stated when his statement was taken.[2] Such refurbishing and improvement of recollections are, it is true, *possible* even after the lapse of over nine years from the commission of the crimes to the trial of MacDonald. Some government witnesses did change their original stories.[3] Yet, in general, the likelihood is greatly diminished. The substantial possibility of prejudice is what controls; it is not incumbent on the defendant to prove that prejudice inescapably took place. *Cf. Moore* v. *Arizona*, 414 U.S. 25 (1973) (per curiam).[4]

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[2] Not all of the nine year delay was attributable to the government, but all of it contributed to the fading of memories. Excluding the period until June 1972 when the CID investigation report reached the Justice Department, and the time following the January 1975 indictment, which MacDonald acknowledges did not constitute inexcusable delay (*see* 531 F.2d at 202), there were still more than two years in which essentially all that the government did was debate, in a desultory way, whether to press for prosecution or to drop the case. That delay was unreasonable and inexcusable. It contributed to the dissipation of recollections. That consideration suffices to engage the speedy trial protection of the Sixth Amendment.

[3] MacDonald has contended that those changes to his detriment were also prejudicial occurrences attributable to the undue passage of time resulting from the government's delay. We need not explore the substantiality of that contention.

In this regard, the loss of the testimony of Helena Stoeckley has been cited by MacDonald as the greatest prejudice to him occasioned by the undue passage of time. In a bizarre way, she had made remarks to others on several occasions in 1970, 1971 and 1979, which, while far from precise or complete, indicated that she was one of a group of intruders whose supposed entry into the MacDonald home and killing of his wife and children constituted the essential defense offered by MacDonald.

We do not agree that this was the greatest prejudice to the defense. Nevertheless, Stoeckley's statement on the stand at trial that she had no recollection of her whereabouts or activities during the critical period of midnight to 4:30 A. M. on the night of the crimes (although she remembered in detail events immediately prior and immediately subsequent to that crucial interval) had a great potential for prejudice to MacDonald, given the substantial possibility that she would have testified to being present in the MacDonald home during the dreadful massacre. The likelihood that Stoeckley would testify that she could not remember was inevitably increased by the passage of the period of inexcusable delay. The consquences of having put on a witness who was to have verified MacDonald's own version of a Manson-like intrusion, only to have her fail to do so, may well have been disastrous to the defense. The potential for the drawing of adverse inferences by the jury is palpable. Yet the difficulty may not be dismissed as one of the inescapable risks associated with any tactical decision taken at trial. If Stoeckley could have remembered and testified to the critical $4\frac{1}{2}$ hours, her remarks to others created a substantial enough basis that one cannot fault the decision to put her on the stand. MacDonald was entitled to that tactical course without its efficacy's having been vitiated by inexcusable action of the government. Had Stoeckley testified as it was reasonable to expect she might have testified, the injury to the government's case would have been incalculably great. The possible reasons why Stoeckley did not so testify are several.[5] But the reason she asserted under oath was failure of memory. The government's inexcusable delay of over two years' duration cannot be eliminated as a potential—indeed a probable—cause of that memory lapse.

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[4] In *Barker* v. *Wingo*, 407 U.S. 514, 532 (1972), Justice Powell identified as an interest of the defendant bearing on the existence of prejudice: "the possibility that the defense will be impaired."

The consideration that Stoeckley had theretofore demonstrated a great unreliability would not render omission of such testimony harmless error, for it would have only created an issue of credibility for the jury on the central question of fact which it was called upon to resolve.[6] The present case did not present the situation of a witness who would of necessity have to have committed perjury, if allowed to testify, as would be the case with someone shown to have been in prison at the very time the events occurred about which he was to testify. Exclusion of testimony from such a source obviously would be proper. However, the possibility that Stoeckley was physically present at the scene was not ruled out. Questions as to reliability of her testimony went only to the weight—a matter for the jury—not to the imposibility of her having experienced what she was proferred to testify about—a matter for the court.

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[5] A likely one is that she was not on the scene of the crimes at all. However, that possibility did not erase the potential prejudice to MacDonald, for it was only a possibility. It was also quite possible that she was present, and could have given evidence supportive of MacDonald's thesis that intruders killed his wife and daughters.

[6] Efforts of MacDonald to supply the deficiency of Stoeckley's memory by introducing hearsay testimony from those she had told stories which placed her on the scene on the

Nor does it suffice for the government to point out that the denial of Stoeckley's testimony to MacDonald *may* not have been attributable to the government's delay. The governmnt makes reference to testimony from one of those to whom Stoeckley told a story seeming to implicate her that, within a week of the crimes, she was stating that her memory was essentially blank as to the crucial hours. Her memory has resembled a lightbulb not screwed tight, blinking on and off. Still, however much other possible explanations for her memory loss can be asserted, the unavoidable principle remains that passage of time generally tends to erase memory. While other factors may have contributed, the possibility, indeed the

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night of the crimes were thwarted by government objections sustained by the district judge on the basis of Fed. Rules of Evid. 403, 804(b)(3). We have no occasion to question the correctness of the judge's evidentiary rulings. With hindsight, however, the government prosecutors may rue having prevented curative action for one potentially devastating prejudicial consequence of the government's unwarranted delay and concomitant failure to move ahead in a fashion to insure to MacDonald a speedy trial.

probability, that unreasonable delay was the cause cannot be excluded.

Although, in this important aspect, prejudice, the fourth *Barker* factor, we approach MacDonald's Sixth Amendment allegation from a different background than that available to this Court in *MacDonald, First, supra,* we are still of the opinion that viewed in the light of all the evidence developed at trial, there was substantial possibility that MacDonald's defense was prejudiced by the delay.

As stated, we need not base our conclusion of prejudice solely or principally on the failure of Stoeckley. A pertinent comment of Justice Powell in the *Barker* opinion is relevant to the testimony of each witness whose testimony was based on his investigation of the case more than five years before the trial: "Loss of memory, however, is not always reflected in the record because what has been forgotten can rarely be shown." 407 U.S. at 532. *MacDonald, First* rested substantially on this general principle—of almost certain memory erosion in the cases of all witnesses where the case has the characteristics of this one. Facts adduced at trial did little to dispel this judgment.

The possibility of prejudice to the defense at trial, although important, is only one element of the prejudice that may be shown to sustain a Sixth Amendment attack. As Justice White stated in his concurring opinion in *Barker*:

> Only if such special considerations [those considerations presenting a pressing public need] are in the case and if they outweigh the inevitable personal prejudice resulting from delay would it be necessary to consider whether there has been or would be prejudice to the defense at

> trial. "[T]he major evils protected against by the speedy trial guarantee exist quite apart from actual or possible prejudice to an accused's defense." *United States* v. *Marion, supra*, at 320.

Barker, supra, 407 U.S. at 537-38. It is significant that the full Court later quoted with approval Justice White's language preceding the above quotation:

> Moreover, prejudice to a defendant caused by delay in bringing him to trial is not confined to the possible prejudice to his defense in those proceedings. Inordinate delay,
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> > "wholly aside from possible prejudice to a defense on the merits may 'seriously interfere with the defendant's liberty, whether he is free on bail or not, and . . . may disrupt his employment, drain his financial resources, curtail his associations, subject him to public obloquy, and create anxiety in him, his family and his friends.' *United States* v. *Marion*, 404 U.S. 307, 320 (1971). These factors are more serious for some than for others, but they are inevitably present in every case to some extent, for every defendant will either be incarcerated pending trial or on bail subject to substantial restrictions on his liberty." *Barker* v. *Wingo, supra*, at 537 (White, J., concurring.)

Moore v. *Arizona*, 414 U.S. 25 (1973) (per curiam). *See also Strunk, aka Wagner* v. *United States*, 412 U.S. 434, 439 (1973) ("The speedy trial guarantee recognizes that a prolonged delay may subject the accused to an emotional stress that can be presumed to result in the ordinary person from uncertainties in the prospect of facing public trial . . . .").

It is also important to remember Justice Powell's admonition that the four *Barker* factors have "no talismanic qualities; courts must still engage in difficult and sensitive balancing process." *Barker, supra,* 407 U.S. at 533.

The sensitive process of balancing is a task highly individualized by the circumstances of each prosecution. The amount of demonstrable trial prejudice which would be violative of MacDonald's right to a speedy trial is affected by his persevering five-year insistence that his case be resolved and by his open and aggressive participation in the investigatory process. Weighing heavily in the equation is the government's calloused and lackadaisical attitude which was solely responsible for at least the last two years of delay. To require a showing approximating actual prejudice would have the adverse effect of encouraging such irresponsible administration of criminal justice. Also included in this equation is the personal prejudice to the accused. Not only was he under a cloud of suspicion for five years prior to the trial, but the personal pressure and anxiety of a threatened prosecution for murder is demonstrated by the expense and concern he expended in attempting to have the charges resolved.

The prosecution consisted solely of highly technical circumstantial evidence. The government had the great advantage of unlimited financial and personal resources, access to laboratory and other technical devices, presenting evidence by skilled technical witnesses upon whom the jury must principally rely.[7]

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[7] In one sense such technical circumstantial evidence is easier to preserve during a delay, but in another sense, after five years it is easier to orchestrate an array of technical evidence. The technical witnesses frequently are relying on

The required judicial balancing process necessary to determine a violation of the Sixth Amendment, speedy trial requirements has been particularly difficult. It is made more difficult by the terrible crime and by the fact that a jury has found MacDonald guilty after a protracted trial. The vital balancing, however, tips the scales decisively in favor of finding a violation by the government of MacDonald's Sixth Amendment rights. We cannot and do not assess the correctness of the jury's verdict, and regardless of that we certainly cannot let such considerations condone or establish a prosecutorial method of obtaining convictions in violation of the fundamental constitutional right of future generations.

Under the Sixth Amendment, a showing of unreasonable delay, plus substantial proof of prejudice, mandates a holding that the constitutionally guaranteed speedy trial has been denied. *Barker* v. *Wingo*, 407 U.S. 514 (1972). For Fifth Amendment purposes there must be a determination that the prejudice was so extreme as to amount to violation of "those 'fundamental conceptions of justice which lie at the base of our civil and political institutions,' . . . and which define 'the community's sense of fair play and decency,'" *United States* v. *Lovasco*, 431 U.S. at 790. Under the Fifth Amendment, proof of prejudice is generally a necessary, but it may not be a sufficient element of a due process claim. The test,

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scientific speculation and trial and error. An example important to his case is the testimony concerning the way in which a pajama top was folded over the deceased wife. The testimony was deduced years after the crime by matching numerous ice pick holes in the garment. This testimony was calculated to demonstrate that this stabbing was arranged after her death in order to simulate an intruder's attack.

as to prejudice, for Sixth Amendment purposes is not so stringent. *Barker* v. *Wingo*, 407 U.S. 514, 532 (1972). The fact that the delay was undue and resulted in prejudice suffices in MacDonald's case, whether or not the delay and consequent prejudice were so egregious as to amount to deviation from "fundamental conceptions of justice." The extensive discussion in *Lovasco* of how extreme was the prejudice suffered by the accused by reason of the delay, therefore, has little pertinence to the Sixth Amendment claim of MacDonald that he was not accorded a speedy trial.

We, therefore, remand the case to the district court with directions to set aside its judgment, vacate the sentences, and dismiss the indictment.[8]

Reversed and Remanded.

ALBERT V. BRYAN, SR., dissenting:

Murder of his pregnant wife and his 6 and 3-year old daughters, with a blunt instrument, a knife and an ice pick, between midnight and dawn on February 17, 1970, in their home at Fort Bragg, North Carolina, was charged to Jeffrey MacDonald by a Federal indictment. His guilt and sanity were established to the satisfaction of the trial jury beyond a reasonable doubt. Nevertheless, this court absolves him forever of his hideous offense, shockingly laying his release exclusively on the failure of the Government to prosecute within a shorter time than it did. The majority's resolution is achieved through utilization of the Sixth Amendment's exaction that "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial . . . ."[1] This implementation of the constitutional clause was held untenable by the District Judge, and I agree.

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[8] *Strunk, aka Wagner* v. *United States*, 412 U.S. 434, 440 (1973).

The opinion of the majority here alludes to *Barker* v. *Wingo*, 407 U.S. 514 (1972), a decision that gives guidance in the application of this clause. In *Barker*, the Supreme Court charted a balancing test, identifying four factors the courts should consider in ascertaining whether the right to a speedy trial has been denied: the length of the delay; the reason for the delay; the defendant's assertion of the right; and prejudice to the defendant resulting from the delay. *Id.* at 530. The Court emphasized, however, that "[a] balancing test necessarily compels courts to approach speedy trial cases on an *ad hoc* basis. [The Court] can do little more than identify some of the factors which courts should assess in determining whether a particular defendant has been deprived of his right." *Id.* Keeping in mind the Court's repeated admonition that none of the four points mentioned is determinative but, rather, that "they are related factors and must be considered together with such other circumstances as may be relevant," *id.* at 533, the appellant's speedy trial premise should be rejected.

With regard to the first factor, the length of the delay, the appellant calls attention to the lapse of five years between the date of the crime, February 17, 1970, and the return of the indictment, January 24, 1975.[2] Baldly stated, the count of five years conjures up serious prosecutorial dawdling, but in the light of the record this appearance vanishes.

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[1] Incidentally, Congress has declared that there shall be no limitation of time on a prosecution for murder. 18 U.S.C. § 3281.

[2] It is conceded that the Government is not responsible for any significant delay occurring since then.

Immediately upon word of the crimes, the Army's Criminal Investigation Division (CID) took the primary role in the investigation. Not until May 1, 1970, however, did the Army charge MacDonald with the murders. On October 23, 1970, the commanding general of MacDonald's unit at Fort Bragg dismissed the case after reviewing the investigating officer's report which concluded that the charges were "not true."

Nevertheless, upon the request of the Department of Justice, the CID still pursued the inquiry in an "extensive and wide ranging" discovery effort. In June, 1972, it submitted to the Department a 13-volume report; supplements thereto were transmitted in November, 1972, and August, 1973, at the Department's request. These reports reflected the sweeping breadth of the investigation, which embraced almost 700 interviews and numerous scientific tests. A number of Government attorneys having reviewed and evaluated the reports, a grand jury was impanelled in August, 1974—only one year after the filing of the CID's final investigative report—to consider the MacDonald family murders.

While the grand jury was taking evidence, the Federal Bureau of Investigation continued the probe. Its exploration led to the exhumation of the bodies of the three victims; the object was to obtain samples of their hair, in order to compare them with strands found on pieces of evidence in the MacDonald home. Obviously, neither the grand jurors nor the Government were idle between the calling of the jury in August, 1974, and the return of the indictment in January, 1975.

The crucial period of delay attributable to the Government, then, is, at most, the period of slightly more than two years between the CID's submission of its initial, major report in June, 1972, and the convening of the grand jury in August, 1974. Even assuming that the case could have been put before a grand jury at an earlier date, the fact that some substantial delay occurred only touches off inquiry into the other relevant factors and does not itself establish a constitutional deviation. *Barker* v. *Wingo*, 407 U.S. at 530.

Passing to the second factor isolated in *Barker*—the justification the Government offers for its delay—contrary to the majority's condemnation of the Government, to me the deferment of grand jury submission was well advised, both in public concern and in fairness to MacDonald. Certainly, the Department of Justice was wise to await a mature completion of the CID's inquisition, taking advantage of the comprehensiveness and expertness of its scrutiny and evaluation of the evidence.

Fairness to MacDonald, too, dictated postponement of the calling of a grand jury. Historically, the grand jury has been, and presently still stands as, an institution interposing a bulwark for the protection of the individual citizen as well as of the public. Because an indictment is a solemn charge, whether followed by a verdict of guilty or an acquittal, the deliberations and returns of a grand jury should never be regarded as mere formalities. Notwithstanding that, after acquittal, the indictment is theoretically without force or effect, as a practical matter, it brands the subject as a criminal suspect for the rest of his life; it will be recalled whenever his name is mentioned, especially when the offense charged is particularly grave or shocking. In addition to the personal anxiety and humiliation anyone so accused endures, the practical consequences of this stigma to a banker, lawyer, physician, or any person holding a position of responsibility may be devastating. It follows as a matter of fairness that no one should be exposed to this future shadow until the Government has gleaned all available evidence.

Appellant contends, and the majority agrees, that the justifications the Government offers for its delay in seeking the indictment are wholly unacceptable. Insofar as the Government may cite internal bureaucracy as a source of postponement, some disapproval may be warranted. Nevertheless, the quantity of evidence amassed, and the time required to assess it, must be taken into account. The 1972 report, it will be remembered, comprised not less than 13 volumes; these had to be closely read and digested, not given just a sketchy oversight. Finally, it should be kept in mind throughout, any failure of the Government's explanation completely to justify the entire period of delay is not decisive; it is merely a factor to be considered in the balance.

As to the third consideration enumerated in *Barker*, it is indisputable that MacDonald attempted to assert his right to a speedy trial. During the years involved, he manifested an eagerness to have the matter resolved and apparently did nothing to impede the progress of the prosecution.

The fourth factor to which *Barker* directs attention is prejudice to the defendant. There and in *Moore* v. *Arizona,* 414 U.S. 25 (1973) (per curiam), the Court "expressly rejected the notion that an affirmative demonstration of prejudice was necessary to prove a denial of the constitutional right to a speedy trial." *Id.* at 26. The majority here relies on that precept in averring that the delay in MacDonald's indictment gave rise to "the substantial possibility of prejudice," and in deeming that possibility a sufficient basis for concluding that his right to a speedy trial had been denied.

Admittedly, MacDonald need not affirmatively prove actual prejudice as a single, essential prerequisite to his claim under the Sixth Amendment; nonetheless, we must turn to the record and to the surrounding circumstances to ascertain the extent, if any, to which MacDonald's defense was impaired directly as a consequence of the delay in prosecution.[3] Although the focus is on the *possibility* of prejudice, we must not ignore what *actually* transpired.[4] In this, I join the District Judge's finding, in his post-trial order refusing bail pending appeal, that "[t]he fears . . . that the defendant's ability to defend the case adequately might be seriously prejudiced by the pre-indictment delay *have not been borne out* in the record developed at trial." *United States* v. *MacDonald*, No. 75-26-Cr-3 (E.D.N.C. Order of Sept. 14, 1979) (accent added).

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[3] Prejudice is to be considered in the light of the purposes of the speedy trial right: "(i) to prevent oppressive pretrial incarceration; (ii) to minimize anxiety and concern of the accused; and (iii) to limit the possibility that the defense will be impaired." *Barker* v. *Wingo*, 407 U.S. at 532. The first concern is not raised in this case because MacDonald was subject to some form of restraint for only the brief period between April and October, 1970, and that by the Army. Moreover, acknowledging that prejudice, in the form of personal adversity unrelated to the merits of the defense, will be "inevitably present in every case to some extent," *id.* at 537 (White, J., concurring), *quoted in Moore* v. *Arizona*, 414 U.S. at 27, it may be presumed that MacDonald suffered anxiety and concern as a result of the delay in prosecution. Nevertheless, the record reveals that he was able to proceed with his life, reestablishing himself professionally and developing new friendships. Because the postponement of his indictment does not appear to the District Judge or to me to have impaired, directly or inordinately, MacDonald's personal life during the period at issue, this form of prejudice is not a crucial factor in this case. Therefore, the analysis will focus on the third concern, prejudice to MacDonald's defense on the merits.

Both in brief and in oral argument, appellant put forward a number of instances in which, he complains, his defense suffered as a result of the delay in his trial. A reading of the record reveals, however, that MacDonald's ability to defend himself was not significantly impaired, either in the particular ways he names or in any other manner apparent in the record.

Among the impediments to his defense MacDonald urges is deterioration of certain physical evidence between the time of the murders and the trial date. He calls attention to his pajama top, asserting that characteristics of the multiple puncture holes found in it—characteristics that might have enabled him to contradict the prosecution's damaging inferences—had vanished with time. Advertence to the record disclosures, however, that the loss of these characteristics (the visible differences between "entry holes" and "exit holes") took place rapidly and may not be attributed specifically to the two-year delay imputed to the Government; indeed, it is admitted that even in 1971 few of the holes in the garment could be identified as entry or exit holes. Another of MacDonald's aggrievements centers on the deterioration of a bloody footprint, which he was no longer able to distinguish adequately at trial. He had not contested the print as his, however, and he fails to show the import of that line of inquiry. Other contentions of changes in the physical evidence likewise do not demonstrate convincingly that the defendant's situation was significantly weakened by the delay in indictment.

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[4] The opinion of the Supreme Court holding that this prosecution could not be dismissed on speedy trial grounds prior to trial on the merits, *United States* v. *MacDonald*, 435 U.S. 850 (1978), *rev'g* 531 F.2d 196 (4th Cir. 1976), supports this approach. The Court noted that "[t]he resolution of a speedy trial claim necessitates a careful assessment of the particular facts of the case" after those facts have been established at trial. *Id.* at 858. The Court added: "Before trial, of course, an estimate of the degree to which delay has impaired an adequate defense tends to be speculative." *Id.* One of the advantages of reviewing such a motion after a decision on the merits has been rendered, therefore, is that, for the most part, speculation can be avoided.

The next ground for MacDonald's insistence as to prejudice is the effect of the delay on the testimony of witnesses. Foremost in this argument is the impact of the postponement on the testimony of Helena Stoekley. MacDonald contends that delay effectively robbed him of the benefit of her testimony because, in the intervening period, she had lost memory of her activities, her whereabouts, and her companions on the night of the murders, and of certain inculpatory remarks she subsequently had made.

The majority agrees with appellant that Stoekley's statement at trial that she could not recall her activities in the critical hours "had a great potential for prejudice to MacDonald, given the substantial possibility that she would have testified to being present in the MacDonald home during the dreadful massacre." *Supra*, at ———. Nothing in the record, however, warrants the assumption that Stoekley would have or could have given the testimony the majority would ascribe to her had the Government secured its indictment earlier.

Stoekley herself in her trial testimony explains that her inability to recall the pre-dawn events of February 17, 1970, resulted from her consumption, earlier in the evening, of large quantities of drugs; she in no way indicated that *time* had weakened her recollection. The evidence given by a neighbor of Stoekley's at the Army hearings in 1970 narrates that, within a week or two of the murders, Stoekley told him that she could not remember where she had been on the night of the crime. Similarly, the record reveals that the statements concerning the murders, which she reputedly made to various persons in the months and years preceding MacDonald's trial, are vague, fragmented and contradictory; they do not indicate simply a gradually fading memory, eroded by time.[5] Unmaintainable on the record is the major-

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[5] The District Judge noted, with regard to Stoekley's testimony at trial:

> Stoekley was put on the stand by defense counsel and questioned at considerable length about her knowledge of the MacDonald murders. The substance of her testimony was that she was not involved in the murders but that because of her drug-crazed condition she had at least come to wonder whether or not she was in fact involved, and she admitted to owning . . . clothing [similar to that ascribed by MacDonald to one of the alleged intruders] . . . and to the fact that she seemed to go into mourning following the murders. The Court gained the unmistakable impression which it believes was shared by the jury that this pathetic figure was suffering from drug-induced

ity's position that it was "reasonable to expect [Stoekley] might have testified" that she witnessed the murders and that "[t]he Government's inexcusable delay of over two years' duration cannot be eliminated as a potential—indeed a probable—cause of [her] memory lapse." *Supra* at ——. Instead, the record fully upholds the Government's contention that any culpable delay on its part had no discernible effect on Stoekley's testimony. Furthermore, none of the other instances of prejudice he lists tends to prove that MacDonald's ability to defend himself was impaired significantly by the deferred indictment.

Finally, in this case, viewed in its entirety, the absence of substantial prejudice and the reasonable assessment of the other factors to which *Barker* draws attention do not sustain the accusation that the Government disregarded its constitutional duty to bring MacDonald promptly to trial or trampled on the aims of the Sixth Amendment.

Affirmance of the judgment now on appeal is demanded by the record.

> mental distortion and that she could be of no help to either side in the case.

United States v. MacDonald, No. 75-26-Cr-3 (E.D.N.C. Order of Sept. 14, 1979). Totally apart from the question of the trustworthiness or untrustworthiness of Stoekley's testimony, her remarks on the stand do not reflect a diminishing recollection of the events of nine years before, but rather a preexisting gap in her ability to recount those events. This gap cannot reasonably be attributed to the prosecution's failure to secure an indictment earlier.

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 79-5253

75-26-CR3

UNITED STATES OF AMERICA, APPELLEE

v.

JEFFREY R. MACDONALD, APPELLANT

Appeal from the United States District Court for the Eastern District of North Carolina.

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the Eastern District of North Carolina, and was argued by counsel.

On consideration whereof, It is now here ordered and adjudged by this Court that the judgment of the said District Court appealed from, in this cause, be, and the same is hereby, reversed. The case is remanded to the U. S. District Court for the Eastern District of North Carolina, at Raleigh, with directions to set aside its judgment, vacate the sentences, and dismiss the indictment, consistent with the opinion of this Court filed herewith.

Filed Jul. 29, 1980

/s/ William K. Slate, II
Clerk

A True Copy, Teste:

William K. Slate, II, Clerk
By Julian S. Coyne

APPENDIX C

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 79-5253

UNITED STATES OF AMERICA, APPELLEE

vs.

JEFFREY R. MACDONALD, APPELLANT

On Request for Rehearing En Banc

Submitted: August 18, 1980

Decided: December 18, 1980

PER CURIAM:

The petition for rehearing is denied, Judge Bryan dissenting. A majority of the judges of the Court who are in regular active service has not voted in favor of rehearing en banc, and the request therefor is accordingly denied.

Annexed hereto are:

(1) Dissenting statement of Chief Judge Haynsworth.

(2) Dissent of Judge Russell, Judge Widener, Judge Hall and Judge Phillips.

(3) Statement of Judge Murnaghan.

HAYNSWORTH, Chief Judge, dissenting:

Ordinarily, I think it inappropriate for judges to write in support of losing votes for an *en banc* rehearing. The situation presented here, however, is not ordinary, for the question which five of the ten judges in regular active service sought to have the *en banc* court consider has never been addressed in any of the panel opinions. In this very extraordinary case, I think the parties and the public are entitled to know the question which five of the judges sought to have argued before, and determined by, the full court.

Of course, preindictment delay may be relevant to a Fifth Amendment claim of deprivation of due process. That is true whether or not there had been an earlier indictment or arrest which had been terminated by dismissal or release. The relevance of such an interval between two separate proceedings to a Sixth Amendment claim of denial of a speedy trial, however, has never been adjudicated by this court. I would prefer not to express what may appear to be a considered opinion of it without plenary consideration of it by the full court, but denial of the rehearing forecloses that possibility. My tentative agreement with the position of the United States in its petition for rehearing was sufficiently firm, however, to prompt me to request a poll of the court on the suggestion of rehearing *en banc* and to vote for it.

Under these circumstances, it seems to me appropriate for Judges Russell, Widener, Hall and Phillips to give expression to their views and for me to file this tentative addendum in agreement with them that the interval between Dr. MacDonald's release by the Army and his later indictment is irrelevant to a consideration of his Sixth Amendment claim.

JUDGES RUSSELL, WIDENER, HALL, and PHILLIPS, dissenting.

We dissent from the denial of *en banc* rehearing in this case. We do so primarily because the denial results in a complete failure by this Court to address a point raised by the Government in its petition for rehearing, which we regard as completely dispositive against any claim by the defendant under the Sixth Amendment.[1] The point raised is that, in assessing the length of delay under a Sixth Amendment claim, it is not appropriate to take into account periods between successive indictments during which a defendant was under no accusation.

Barker v. *Wingo*, 407 U.S. 514, 530 (1972), declares that the first question to be addressed in resolving every Sixth Amendment speedy trial claim, which is the claim on which the panel opinion reverses, is the determination of the "length of delay" in the prosecution. Unless such delay is sufficiently lengthy to be assessed as "presumptively prejudicial,"[2] the claim of constitutional violation must fail and it is unnecessary for the Court to consider any of the other factors listed in *Barker*. *Id.* at 530. It is thus clear that it is crucially important to identify both the beginning and the ending date for computing "length of delay" in the prosecution, as that term is used in *Barker*, and as further defined in *United States* v. *Dillingham*, 423 U.S. 64 (1975). The first opinion in this case[3] fixed both critical dates. The Court in that opinion found that the relevant period for computing "length of delay" was the period of "delay between the accusation and detention of MacDonald [under the military proceedings and his indictment in this proceeding, which] was more than four and one-half years." 531 F.2d at 205. It fixed the beginning date as May 1, 1970, when the Article 32 military proceedings were begun against MacDonald. These proceedings the court considered to be the equivalent of a civilian arrest.[4] It identified the termination of the critical period as the return of the indictments. It did this because the defendant conceded that there was no "substantial delay" after indictment. Since the defendant was himself responsible for any real delay after indictment, he could not have avoided making such concession.[5] The court in *MacDonald I* proceeded to find that this delay of four and one-half years was sufficient to justify, under the *Barker* "triggering" test, "inquiry into the other factors that go into . . . assessing MacDonald's claim that he has been denied a speedy trial." *Id.* at 205. The present panel opinion adopts this conclusion of *MacDonald I.*[6]

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[1] We do not address any claim for relief by the defendant under the Fifth Amendment because *the panel opinion very clearly declares at the outset that it does "not reach . . . the . . . the Fifth Amendment issue."* If an issue under the Fifth Amendment is to be considered, it can only be done by granting the Government's motion for rehearing.

[2] *Barker* v. *Wingo*, 407 U.S. at 530.

[3] *United States* v. *MacDonald*, 531 F.2d 196 (4th Cir. 1976) [hereinafter refered to as "*MacDonald I*"].

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[4] The defendant MacDonald was charged in an affidavit, filed under Article 30 of the Uniform Code of Military Justice, 10 U.S.C. § 830, with the murder of his wife and children. On the basis of that charge, the defendant was "restricted to quarters" and "relieved of duty" and an Article 32, 10 U.S.C. § 832, hearing was set to determine whether probable cause existed for sending the matter up for a court martial. At the conclusion of the Article 32 hearing, it was recommended that the charges be dismissed and that recommendation was accepted and adopted by the commanding general, with the result that as of October 23, 1970, the military charges against the defendant were dismissed. Subsequently, in December, 1970, the defendant requested and received an honorable discharge from the Army. He then established himself in California, where, between 1971 and his indictment in 1975, he was actively engaged in the practice of medicine.

[5] *Hill* v. *Wainwright*, 617 F.2d 375 (5th Cir. 1980) ("If the postponement is occasioned by the actions of the accused himself, the delay . . . may be excused." *Id.* at 378); *Keeny* v. *Swenson*, 458 F.2d 680, 682 (8th Cir.), *cert. denied*, 409 U.S. 1027 (1972); *United States* v. *Cook*, 400 F.2d 877, 878 (4th Cir. 1968) (per curiam), *cert. denied*, 393 U.S. 1100 (1969); *Morland* v. *United States*, 193 F.2d 297, 298 (10th Cir. 1952); *Iva Ikuko Toguri D'Aquino* v. *United States*, 192 F.2d 338 (9th Cir. 1951).

Our point of difference with the present panel opinion, as well as with *MacDonald I*, is the inclusion in the computation of "length of delay" the period between the dismissal of MacDonald's military arrest in October, 1970 and January, 1975, when he was indicted. This was a period during which he was not under arrest, was not under indictment or any other form of legal accusation, civil or military. There was no charge pending against him, and thus there was neither a trial nor even a hearing which he could request or demand. In short, there was nothing to which a claim for a speedy trial could attach. From December, 1971 to January, 1975, he was practicing his profession without hindrance of any kind. If this period of time is eliminated from the period of delay found by the panel and by *MacDonald I*, the delay will be at most seven months, a period entirely too short to "trigger" further inquiry under *Barker*. See *United States* v. *McGrath*, 622 F.2d 36, 40-41 (2d Cir. 1980).

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[6] There is some confusion in the panel opinion on this point. Immediately after declaring that it adopts the conclusion and reasoning of the Court in *MacDonald I* on "length of delay," which under *MacDonald I* was calculated from the date of the military arrest to the date of the indictment, the present panel opinion states in the very next sentence that the "length of delay" in this case, under the *Barker* rule, was "the lapse of time between the military arrest and trial." By this statement, it would double the time period found in *MacDonald I* to be the proper computation of "length of delay" for purposes of resolving the "triggering" factor under *Barker*. In so doing, it overlooks entirely the reasons which prompted Judge Butzner in *MacDonald I* to terminate the calculation of delay with the return of the indictment, *i.e.*, that the defendant himself, by his various motions and appeals had been the author of any substantial delay that followed the indictment.

That this period beween 1970 and 1975 when the defendant was free of any legal accusation of any kind is not to be counted in computing "length of time" is clearly established in the opinion of Judge McCree in *United States* v. *Martin*, 543 F.2d 577, (6th Cir. 1976), *cert. denied*, 429 U.S. 1050 (1977); in fact, it can be argued that the entire period of time between the filing of the first indictment and its dismissal was thought by the Court in that case to be outside the period to be considered in evaluating delay in connection with the second indictment. The opinion of Judge McCree in that case is directly on point. In *Martin*, the defendant was charged under an indictment returned in August, 1972. Those charges were dismissed in January, 1973.[7] A second indictment was filed in December, 1974 and the defendant was tried and convicted in December, 1975. He contended both at trial and on appeal that the delay from his first indictment to his trial in December, 1975 violated his speedy trial rights under the Sixth Amendment. In dismissing the contention and in holding that the period between the dismissal of the first indictment and the return of the second, if not the entire period between the first and second indictments, was to be disregarded in calculating "length of delay" under *Barker*, Judge McCree said:

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[7] There is a difference between this case and *Martin*. In this case, the first proceeding never got to the indictment stage. It was dismissed at the preliminary hearing stage, if we analogize the military procedure to civilian criminal procedure. In the *Martin* case, the dismissal was after indictment. But as a practical matter, the earlier proceedings in both cases were effectively terminated by a dismissal, in the one case of the military charges and in the other of the indictment, and so the legal consequences of the two dismissals are the same.

> The Sixth Amendment right to a speedy trial does not attach until the formal charge, *the trial of which is alleged to have been inordinately and prejudicially delayed, is made. United States* v. *Marion*, 404 U.S. 307, 92 S.Ct. 455, 30 L.Ed.2d 468 (1971). Because there was no indictment which could have been tried in the period between January 1973 and December 1974, we cannot say that a speedy trial was delayed during that time. The remaining time is not remotely comparable to the five year delay which provoked the analysis in *Barker* v. *Wingo*, 407 U.S. 514, 92 S.Ct. 2182, 33 L.Ed.2d 101 (1972). Even if we were to include the five months between the filing and dismissal of the earlier charges in this case, the total period of delay would still be less than the time between Barker's first objection to delay and Barker's trial. Even that period was insufficient to show a violation of Barker's Sixth Amendment rights. *Id.* at 579. (Emphasis added.)

Moreover, Congress, in enacting the Speedy Trial Act of 1974, 18 U.S.C. § 3161, *et seq.*, has in essence given legislative imprimatur to the rule announced by Judge McCree in *Martin*, at least its exclusion of the period of time between the dismissal of an earlier indictment and the return of a second indictment. Thus, that Act provides that the period between the dismissal of an earlier indictment and the return of a second indictment for the same offense "shall be excluded * * * in computing the time within which the trial of any such offense must commence" under the Act. 18 U.S.C. § 3161(h). And this is true whether the Government or the defendant has sought dismissal of the earlier indictment. The only distinction which the Court makes between the situation where the Government makes the motion and where the defendant makes the motion, is that the time between the return of the first indictment and its dismissal is included in computing the delay if the dismissal is at the instance of the Government but not if the dismissal is on the motion of the defendant. *But, in both situations, we repeat, the period between dismissal of the first indictment and the return of the second is not counted. See United States* v. *Dennis*, 625 F.2d 782, 793 (8th Cir. 1980).[8]

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[8] *See* the Annotator's Note in 18 U.S.C.S. § 3161, at p. 371:

> Policy and Purpose of Speedy Trial Act of 1974, 18 U.S.C.S. § 3161 *et seq.*, and of all speedy trial plans have been to expedite processing of *pending* criminal proceedings, not to supervise exercise by prosecutor of his investigative or prosecutorial discretion at time when no criminal proceeding is pending before court; to invade judicial branches in matters that fall primarily, if not exclusively, within jurisdiction of executive branch; by same token, neither Act nor Plans were intended to impose time limits in addition to those provided for by Constitution with respect to government investigations undertaken while defendant is not subject of formal proceedings; taken together, 18 U.S.C.S. §§ 3161(d) and (h)(6) make it clear that Congress' purpose was to disregard period after dismissal of complaint and prior to filing of indictment for same offense; although § 3161 (h)(6), read literally, suspends running of Act's time limits upon Government's dismissal of indictment, as

Despite the clarity of Judge McCree's opinion in *Martin* and, in effect, the adoption of this view by the Congress itself in its legislatively mandated Speedy Trial Act, the panel opinion has included in its calculation of "length of delay" the period between 1970 and 1975, after the dismissal of the military Article 32 proceedings when the defendant was not "accused."[9] In *Mac Donald I*, the court sought to justify such inclusion by this reasoning:

> MacDonald's freedom from detention on bail during the interval between the termination of the Article 32 proceeding and his arrest after indictment did not, from a practical standpoint, dispel the effects of the government's initial accusation. MacDonald, of course, realized that the favorable conclusion of the Article 32 proceed-

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distinguished from complaint, it follows that upon voluntary dismissal of complaint period thereafter up to filing of indictment should not be included, if not disregarded entirely pursuant to § 3161(d). *United States* v. *Hillegas* (1978) 578 F.2d 453.

This conclusion follows the authoritative language of S.Rep. No. 93-1021, at 33, Report in the Senate Judiciary Committee on the Speedy Trial Act, July 18, 1974:

> "Thus, when subsequent complaints are brought, the time limits will begin to run from the date of the filing of the subsequent complaint."

[9] It would seem that, since the dismissal of the military proceedings must be taken as at the defendant's motion, the entire time prior to the second indictment should be eliminated from the computation of "length of delay." It does not matter here, though, whether or not we include this period between arrest and dismissal of the military proceedings. Whether included or not, the "length of time" here, just as in *Martin*, would not be enough to meet the "triggering" test under *Barker*.

> ings was not the end of the government's efforts to convict him. Prudence obliged him to retain attorneys at his own expense for his continuing defense. He remained under suspension and was subject to the anxiety of the threat of another prosecution.[10]

531 F.2d at 204. In the present panel opinion, the court finds the same factors to constitute "personal prejudice to the accused [sic]."

The circumstances advanced by the two opinions for refusing to exclude the period when no criminal proceedings of any kind were pending before the court and the defendant was not subject to any legal restraint or accusation will not support a Sixth Amendment speedy trial claim, for the simple reason that there was no charge against the defendant to be tried during this time. What the two opinions overlook is that the defendant has a remedy if any delay prior to indictment created sufficient prejudice that it can be fairly said that the defendant's right to a fair trial has been impaired. But—we repeat—this remedy is not found under the Sixth Amendment speedy trial clause but under the Fifth Amendment due process clause. This fact was made abundantly clear in *Arnold* v. *McCarthy* 566 F.2d 1377, at 1383 (9th Cir. 1978). There, the court said:

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[10] Neither ground stated by the court would justify even a due process claim under the Fifth Amendment. The courts have uniformly dismissed general statements of anxiety as insufficient to support any claim of prejudice. As the court said in *United States* v. *Shepherd*, 511 F.2d 119, 123 (5th Cir. 1975), ". . . anxiety is present to some degree in every case. Something more than the ordinary anxiety that accompanies a trial is necessary to show a degree of prejudice." See also, *United States* v. *Avalos*, 541 F.2d 1100, 1115 (5th Cir. 1976).

The defendant may have continued the representation he had in the military proceedings after the case was referred to the Department of Justice. But such expense as this entailed was directed at inducing the Department not to prosecute. This is hardly a ground in speedy trial cases. In every extended criminal investigation, the one who considers himself as the object of the investigation generally has employed counsel. We doubt that the courts are prepared to consider this expense as prejudice, certainly not prejudice sufficient to justify freeing one whose guilt was later established by the unanimous verdict of a jury after an error-free trial.

> When the mistrial was declared on November 4, 1969, after the jury failed to reach a verdict in Aronld's first trial for robbery assault, the prosecution moved to dismiss the charges. The dismissal was granted without prejudice. After the dismissal Arnold was no longer "accused"; he no longer had any right to demand a speedy trial under the Sixth Amendment. Any contention that he was prejudiced by delay between this dismissal and his second trial must be tested under the general requirements of due process.[11]

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[11] See also *United States* v. *Beckham*, 505 F.2d 1316, 1319 (5th Cir. 1975), and *United States* v. *Davis*, 487 F.2d 112 (5th Cir. 1973), *cert. denied*, 415 U.S. 981 (1974).

The Senate Committee Report, *supra*, p. 7, n.5, suggests this same remedy if there is improper delay between indictments. Thus, after stating that the time limits are inapplicable to the period between a dismissed initial indictment and a second indictment, it states (p. 33):

> The Committee is concerned that this provision not be used to evade the speedy trial time limits set out in this Act. The prosecutor should not be able to avoid the speedy trial time limitations when his carelessness in preparing the original complaint or indictment has resulted in a dismissal under this section. Therefore, when

We suggest with the utmost deference, for what we recognize is the sincere conviction of our colleagues who feel that a rehearing is not required, that as the opinions now stand, it cannot be said that, in setting aside this murder conviction on speedy trial grounds, we have fully covered and clearly resolved the critical threshold issue of "length of delay". This, after all, is an important case with wide public interest. Any opinion in the case should, we respectfully suggest, thoroughly canvas all the points raised, whether in the original hearing or by the petition for rehearing, and, by our opinion on those points, assure the defendant, the government and the public that we have not passed over in silence but have frankly and fully considered those points and reached a just result. This will be one of those rare cases in which a plea of a violation of the speedy trial right under the Sixth Amendment has been upheld. It thus behooves us not to dismiss in silence a serious point, sustained as it is by respectable authority and, by analogy at least, by Congressional action, and to set at naught the verdict of a jury which unanimously found the defendant guilty after an error-free trial. Rehearing and decision on the important point raised by the Government on whether the period between dismissal of the military "arrest" for want of probable cause and the actual indictment should be included in the compu-

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a judge dismisses an original information or indictment on other than speedy trial grounds he should, nevertheless, take into consideration the defendant's right to speedy trial under the statute and under the Constitution. For example, the judge might want to order that the original dismissal be with prejudice so that the prosecutor could not reindict several months after a carelessly drawn indictment has been dismissed.

tation of "length of delay" is, in our opinion, demanded in this case. We dissent from the failure to face the issue directly.

If our opinion is correct that the "length of delay" in this case was insufficient to "trigger" further inquiry into the claim of a violation of the speedy trial provision of the Constitution, it is unnecessary, as we have said, to consider the other factors set forth for consideration in *Barker*. We would remark briefly on these factors, however, on the assumption that, contrary to what we conceive the law to be, the Court could under a Sixth Amendment speedy trial claim, consider delay between the dismissal of the military proceedings and the return of the indictment. We shall accordingly discuss briefly the three factors listed in *Barker* other than the threshold one of length of delay.

The prevailing panel opinion fixes the delay attributable to the Government (the second factor to be considered under *Barker*) as that between the receipt of the CID report by the Department of Justice in 1972 and the date of the return of the indictment, or a period of two and one-half years prior to indictment. The CID report submitted to the Department consisted of thirteen volumes and innumerable documents. It was not a complete report and was so recognized by the CID for it suggested that the Department conduct additional investigations. Such a recommendation was understandable. The crime involved was both horrible and bizarre. The only eye witness was the defendant himself. Any prosecution was dependent upon the development of a convincing web of circumstantial evidence. This was a herculean task. And it was a task that the Government undertook seriously. It felt an obligation both to itself and to the defendant to proceed with great care lest it err either in absolving a likely guilty party or in unfairly charging a seeming innocent party. In this effort to be thorough, it had the CID twice reopen its investigation in order to pursue additional evidence. The bodies of the deceaseds, the wife and children of the defendant, were exhumed in order that a hair test could be performed. The result of these tests was a critical point in the case. It is thus clear that this was not a simple case but one of infinite factual ramifications. Perhaps the Department could have moved with greater speed in investigating these facts. Unquestionably, there was some delay because of, what one court has characterized, as "institutional dysfunction." [12] But the delay from this cause was not substantial and it certainly was not prompted by any tactical or vindictive purpose, or anything other than a "benign" purpose. As such it is not given much weight in this context.[13]

The prevailing opinion suggests that the delay by the Department may have been "a disagreement between two groups in the Justice Department as to whether the case should be prosecuted" or "just simple government bureaucracy." For this latter statement the opinion seems to rely on a statement of an assistant district attorney that from the receipt of the CID report he thought the Government had enough evidence to prosecute. We give little or no weight to this fact. So far from being a criticism of the Department, this hesitancy on its part to proceed on the recommendation of the assistant district attorney without the most careful consideration of every contrary argument and circumstance is to be commended, not condemned. Often a zealous investigator or prosecutor wishes to rush in with a prosecution when others, less intense in their feelings and more balanced in their judgment, would wish further investigation and inquiry. We do not think we should establish any rule that when any zealous "eager beaver" investigator or assistant district attorney recommends prosecution, any delay by the Department of Justice in authorizing prosecution should be ascribed to bureaucratic bungling; nor should we want to criticize the Department for any delay when its delay was due to a desire to consider fairly the arguments of those opposed to prosecution. And this we take to be the opinion of the Supreme Court, as it was forcefully expressed in *United States* v. *Lovasco*, 431 U.S. 783, 790-91 795 (1977).[14]

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[12] *United States* v. *McGrath*, 622 F.2d 36, 41 (2d Cir. 1980).

[13] *Barker* v. *Wingo*, 407 U.S. at 530.

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[14] In this case the Court said at pp. 790-91 and 795:

> It requires no extended argument to establish that prosecutors do not deviate from 'fundamental conceptions of justice' when they defer seeking indictments until they have probable cause to believe an accused is guilty; indeed, it is unprofessional conduct for a prosecutor to recommend an indictment on less than probable cause. It should be equally obvious that prosecutors are under no duty to file charges as soon as probable cause exists but before they are satisfied they will be able to establish the suspect's guilt beyond a reasonable doubt. To impose such a duty 'would have a deleterious effect both upon the rights of the accused and upon the ability of society to protect itself'. . . .
>
> . . . . Rather than deviating from elementary standards of 'fair play and decency,' a prosecutor abides by them if he refuses to seek indictments until he is completely satisfied that he should prosecute and will be able

In short, we feel that, considering the complexity of this case and the difficulty of reviewing the many strands of circumstantial evidence involved, the Government was not guilty of excessive delay in beginning the prosecution.

Turning to the third *Barker* factor, it may be conceded that in this two and one-half year period during which the Department was proceeding with its investigation, the defendant was pressing the Department. Primarily, he sought to induce the Department to abandon the investigation, but he did ask that, if it were going to prosecute, to prosecute then. But it has been held that a putative defendant has no right to demand that he be arrested or that an investigation be abandoned.[15] The reason for this rule is that to uphold such a right would be to interfere improperly with the executive's discretion to investigate and to prosecute. See Judge Mansfield's opinion in *United States* v. *Hillegas*, 578 F.2d 453, 456-7 (2d Cir. 1978). Any contrary rule would enable any person under investigation to frustrate that investigation of his possible criminal conduct by demanding prosecution as soon as he hears that his conduct is under scrutiny. It is easy to see how such

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promptly to establish guilt beyond a reasonable doubt. Penalizing prosecutors who defer action for these reasons would subordinate the goal of 'orderly expedition' to that of 'mere speed'.

[15] *United States* v. *Lovasco*, 431 U.S. at 790-96. See also, *Hoffa* v. *United States*, 385 U.S. 293 (1966). ("There is no constitutional right to be arrested . . . Law enforcement officers are under no constitutional duty to call a halt to a criminal investigation the moment they have the minimum evidence . . ." which may be enough perhaps to establish probable cause, but not sufficient to prove someone guilty beyond a reasonable doubt.)

a rule would thwart the effective prosecution of many complex cases, for example, tax fraud cases, to mention but one instance of the rule's impropriety. Moreover, this contention is appropriately directed only to a claim of violation under the Fifth Amendment (due process) as distinguished from a speedy trial claim under the Sixth Amendment.

Finally, we turn to "prejudice," which is declared to be the most significant "factor" in the *Barker* litany.[16] *Barker* identified the three circumstances which could represent prejudice to the defendant in this context: they are (a) oppressive pretrial incarceration; (b) anxiety of the defendant; and (c) impaired defense. The first two can be quickly disposed of. The defendant suffered no oppressive incarceration, and "anxiety" is present in every prosecution. For that reason, "anxiety" standing alone, will not ordinarily support a claim of prejudice in an accused's defense, since, "[s]omething more than the normal anxiety that accompanies a trial is necessary to show a degree of prejudice." *United States* v. *Shepherd*, *supra*, p. 8; *United States* v. *Hill*, 622 F.2d 900, 910 (5th Cir. 1980); *United States* v. *Venella*, 619 F.2d 384, 386 (5th Cir. 1980). That leaves as the only basis for prejudice in this case a showing of impaired defense. And this does not mean vague claims of prejudice or an assertion of speculative prejudice; it means a showing of actual prejudice to the defendant's defense. This was spelled out by the Court in *Hill* v. *Wainwright*, 617 F.2d 375, 379 (5th Cir. 1980), in which a claim of a speedy trial violation was dismissed because the defendant had "failed to demonstrate *actual* prejudice." (Emphasis added) Judge Bryan's dissenting opinion in MacDonald II demonstrates convincingly why there was no actual prejudice of the defense by the delay prior to indictment. There were many witnesses at the trial. The defendant points only to one witness whose failure to recall, he claims, was prejudicial to his defense. This witness was in such a mental condition that she could not supply any information pertinent to the trial. This was not, however, a condition which developed as a result of any delay in either the investigation or the prosecution of the defendant. From the first interview of this witness shortly after the murders on through all the investigations and post-indictment maneuverings up to actual trial, her mental condition was the same; she could recall nothing relevant to the case. Without any real prejudice, the defendant had neither a Fifth Amendment due process violation nor a Sixth Amendment speedy trial violation.

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[16] In fact, the Supreme Court, in reversing *MacDonald I* indicated quite clearly, if we read correctly its opinion, that the question of prejudice was one to be analyzed and ruled on by the district judge, who had the benefit of the full record as well as the best opportunity to evaluate the credibility and weight to be accorded the evidence, and that his judgment was only to be reversed for clear error. The district judge in this case did so rule but the prevailing opinion of our court gives no weight to this ruling of the district judge. We believe that, in so dismissing without comment the district judge's action, the prevailing opinion has not followed the suggestion of the Supreme Court.

It is possible that some members of the Court may have been influenced against the request for *en banc* rehearing, as filed by the Government, because the primary point on which rehearing was requested was one which the Government had not earlier identified specifically on the first appeal in this case and was not pressed particularly on initial argument on this appeal. The failure of the Government to have expressly brought out the point on the first appeal may make our failure earlier to consider it understandable (one of those concurring in this dissent pleads such excuse) but when, by the petition for rehearing on this appeal, the point is clearly raised, with supporting authority, and the point, if sustained as the Government contends it should be, is dispositive of the critical threshold issue of length of delay under the speedy trial plea, we do not believe the failure of this court even to consider or decide the point is understandable. Whether cited to us early or late, we should not decide cases by dismissing out of hand relevant decisions dispositive of a critical issue in the case. And, if this point pressed by the petition for rehearing by the Government, is tenable, as we feel it is, it requires a reconsideration of all the factors which *Barker* says should be considered in this context. What we strongly object to is the failure even to consider, much less to come to grips with, what we conceive to be a dispositive issue in this case.

In summary, we are convinced that, properly computed, there was not such "length of delay" in this prosecution as to "trigger" inquiry on speedy trial constitutional grounds under *Barker* v. *Wingo.* This fact is made clear in the Government's petition for rehearing. Since the panel opinion is to the contrary, *en banc* rehearing is necessary to correct that error in the panel's opinion.

Though the above point as raised in the petition for rehearing is, in our opinion, dispositive of this case, we are equally convinced that the defendant in this case has not satisfied the requirements of the other factors listed in *Barker* for the granting of a dismissal on speedy trial grounds under the Sixth Amendment.

We accordingly dissent from the denial of rehearing *en banc* by an equally divided vote in this case.

MURNAGHAN, Circuit Judge:

It had been my intention to abide by the customary disposition, a simple indication that the request for rehearing *en banc* had failed for want of a majority vote. In view of the dissent filed by Judges Russell, Widener, Hall and Phillips, however, two additional points should be made.

First, I apologize to my colleagues for the error in langauge in the panel opinion to which the dissent, in footnote 6, calls attention. I erred when I stated that "[t]he offending delay imposed by the government was not the time between the indictment and trial, but the lapse of time between the military arrest and trial." Properly, I should have stated: "[t]he offending delay imposed by the government was not the time between the indictment and trial, but the lapse of time between the conclusion of the military proceedings in October 1970, and the indictment in January, 1975."

Elsewhere the panel opinion confirms that the panel majority did not include time beyond January 1975 for purposes of considering the speedy trial issues.

Second, the reiterated reference in the dissent to the trial in the case as "error-free" is premature and may not be correct. The panel majority was at pains to point out that it did "not reach the district judge's conduct and rulings at trial. . . ." Whether the trial was "error-free" is simply a matter not yet addressed.

Finally, since I have felt compelled to write something, I should not pass, in complete silence, the dissent's principal plaint: its contention that time between dismissal of an indictment (or its equivalent) and the processing of a subsequent indictment should not count for purposes of determining whether a speedy trial has been denied. Few, if any, absolutes exist in our judicial system. Each case presents its peculiar difficulties. While in at least one case, *United States* v. *Martin*, 543 F.2d 577 (6th Cir. 1976), *cert. denied*, 429 U.S. 1050 (1977), the Court said that the interval should not count, it did not say that it would never count. Here the situation was such that, from October 1970 (when the military proceedings concluded with a dismissal) until indictment in 1975, MacDonald's possible involvement was not dormant. The immense publicity and the continued inquietude because the matter was not put to rest engaged the tenets of the Sixth Amendment.

For authority applicable to this particular case, the decision in *United States* v. *MacDonald*, 531 F.2d 196 (4th Cir. 1976), is more compelling than a decision on different facts in another circuit. *See* especially 531 F.2d at 202: "Noting this, the Court carefully avoided adopting a simplistic rule that pre-indictment delay is always immaterial."

APPENDIX D

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NORTH CAROLINA FAYETTEVILLE DIVISION

No. 75-26-CR-3

UNITED STATES OF AMERICA, PLAINTIFF

vs.

JEFFREY R. MACDONALD, DEFENDENT

[Filed Sept. 14, 1979]

ORDER

Convicted by a jury of three counts of murder and sentenced by the court to three consecutive life sentences the defendant, Jeffrey R. MacDonald, through his counsel moved in open court immediately following pronouncement of judgment to be permitted to remain on bail pending appeal. The motion was denied initially but without prejudice to defendant's right to reduce the motion to writing and support it with further authorities and argument. This has now been done and two informal hearings attended by counsel for defendant and the government have been held. The court's final decision not to allow bail pending appeal was announced on September 7, 1979, and the reasons supporting this conclusion will now be recorded.

Although the government did not seek the death penalty in this case, the statute under which it was prosecuted still provides for such penalty, and traditionally bail has not been allowed in capital cases. The Bail Reform Act of 1966, 18 U.S.C. §§ 3146, *et seq.*, however, provides for release on bail of persons convicted of a capital offense who have filed an appeal in accordance with the provisions of 18 U.S.C. § 3146 "unless the court or judge has reason to believe that no one or more conditions of release will reasonably assure that the person will not flee or pose a danger to any other person or to the community . . . or if it appears that an appeal is frivolous or taken for delay. . . ." 18 U.S.C. § 3148. While it is true that this defendant is a well established professional man (a doctor) and has never heretofore failed to meet all court appearances, the situation with which he is now confronted is, of course, far different from that which has heretofore obtained. As a highly skilled physician the defendant presumably would have no difficulty at all in finding employment in any one of the many countries in the world which do not have in effect extradition treaties with the United States, and the temptation to seek refuge in another country would certainly be great indeed in this case.

Even so, the court would be reluctant to keep this defendant imprisoned while awaiting appeal if the court were convinced of the possibility of serious, reversible error in defendant's trial. Defense counsel were therefore requested to set forth in their written motion for bail those assignments of error on which principal reliance would be placed in the appeal, and in their motion they have listed some sixteen or more allegations of error only a few of which the court has deemed worthy of comment.

The cornerstone of defendant's legal defense remains his claim that he was denied his constitutional right of a speedy trial in the case. Quite correctly he points to the fact that the initial ruling of this court denying his motion to dismiss based on speedy trial grounds was reversed in a split decision by the Fourth Circuit almost four years ago. *United States* v. *MacDonald*, 531 F.2d 196 (4th Cir. 1976). But the Supreme Court held that the Fourth Circuit lacked jurisdiction to entertain MacDonald's speedy trial appeal, and the case was eventually remanded to this court for trial. 435 U.S. 850 (1978). After referring to the four factors to be weighed in determining whether an accused has been deprived of his constitutional right to a speedy trial as set forth in *Barker* v. *Wingo*, 407 U.S. 514 (1972) (length of delay, reason for delay, whether defendant has asserted the right and prejudice to defendant from the delay) the Supreme Court stated that prejudice to the defendant from the delay was the most serious and went on to say:

> "Before trial, of course, an estimate of the degree to which delay has impaired an adequate defense tends to be speculative. The denial of a pre-trial motion to dismiss an indictment on speedy trial grounds does not indicate that a like motion made after trial—when prejudice can be better gauged—would also be denied. Hence, pretrial denial of a speedy trial claim can never be considered a complete, formal and final rejection by the trial court of the defendant's contention; rather, the question at stake in the motion to dismiss necessarily 'remains open, unfinished (and) inconclusive' until the trial court has pronounced judgment." *Id.*, 435 U.S. 858-9.

In the light of the Supreme Court's decision this court summarily overruled defendant's renewed motion to dismiss on speedy trial grounds again interposed at the pre-trial conference held on July 14,

1979. At that time the defendant took the position, to which he apparently still strongly adheres, that since the Fourth Circuit has already expressed its opinion on the speedy trial issue notwithstanding its decision was overturned later on jurisdictional grounds, it is a foregone conclusion that the case will again be dismissed on these grounds when it reaches the Fourth Circuit on appeal. This court does not believe that this result necessarily follows, and it is noted in the inception that following the court's order of July 14, 1979 the defendant promptly petitioned the Fourth Circuit for a writ of mandamus asking that the indictment be dismissed on speedy trial grounds which petition the Fourth Circuit just as promptly rejected.

Accordingly, the case has been tried to a jury in this court in a trial lasting six and one-half weeks during all of which time this court has been alert to detect the existence of any of the four factors required to be considered under *Barker* v. *Wingo*, *supra*, in determining the speedy trial issue. The length of the delay between the time of the crimes and the return of the indictment, almost five years, is, of course, fixed and indisputable, and although the government's explanation for much of the delay is not without plausibility, the impression remains that the case could have been put before the grand jury at a much earlier date than it was. There is also some evidence that the defendant expressed the desire to have the case brought to a head one way or the other much earlier than the time the indictment was returned. The assertion of a right to a speedy trial, however, is normally understood to refer to a right to a trial by one who has been indicted and is subject to a trial rather than to a right to have the government to accelerate its efforts to obtain an indictment. It will be remembered, of course, that the four-and-a-half-year delay which followed the indictment was attributable almost entirely to the pursuit by defendant of innumerable motions, appeals and attempted appeals, all of which were ultimately resolved against him.

Essentially, then, the question involved here is whether the defendant has been prejudiced by pre-indictment delay. As stated in *Barker*, this question must be considered in the light of the interests the speedy trial right was designed to protect: "(i) to prevent oppressive pretrial incarceration; (ii) to minimize anxiety and concern of the accused; and (iii) to limit the possibility that the defense will be impaired."

While the Fourth Circuit in its original consideration of the speedy trial issue seemed to equate the defendant's restriction to quarters during the time the case was under investigation by the Army authorities with "pretrial incarceration," Judge Craven in his dissenting opinion in that case pointed out that the conditions under which defendant was restricted were far from burdensome. He apparently was able to go to and from his meals, to play golf and to have a feminine companion to visit him in his quarters from time to time, amenities certainly not enjoyed by one incarcerated in a jail awaiting trial. He apparently continued to draw his full pay without having to work, a privilege which few, if any, persons incarcerated awaiting trial ever enjoy. This court cannot see that there has been any "oppressive pretrial incarceration" in this case.

The anxiety and concern, if any, of this defendant would involve his subjective feelings, and while it can certainly be assumed that he would have much preferred to know that the matter had been finally put to rest, the evidence is that following his honorable discharge from the Army and a short return to his home in New York he moved to California where he promptly established himself in the practice of his profession and acquired a wide host of friends both professional and social. The record would not support a finding that this defendant has suffered great anxiety and concern by reason of the pre-indictment delay in this case.

The fears expressed by the Fourth Circuit in its 1976 decision that the defendant's ability to defend the case adequately might be seriously prejudiced by the pre-indictment delay have not been borne out in the record developed at trial. Almost incredibly, the only material witness on either side of the case shown to have died was a government witness, and not only were all of defendant's original witnesses shown to be available to testify, but he was also able to produce one or more witnesses who were not even known to the defendant until recent times and who gave testimony vital to the defense. In addition the defendant was able to have the benefit of the testimony of several highly competent expert witnesses who were not known to or available to him at the time of the Army hearing in 1970. Finally, by reason of the excellent record he has made in the practice of his profession in California in the last seven or eight years defendant was able to produce a most impressive array of character witnesses none of whom would have been available to him had he been brought to trial within a year or two after the crimes were committed.

Significantly, in none of his motions based on speedy trial grounds has the defendant alleged any particular in which his defense has been prejudiced in the least by delay. Contrarily, this court is of opinion that the delay may very well have worked in defendant's favor in that juries are not known to look with favor on stale claims, and there was no way that the jury in this case could have known that approximately one-half of the delay here was attributable to actions taken by the defendant himself rather than the government. Be this as it may, the court finds that the defendant's ability to defend this case adequately was not prejudiced by any of the delay, pre-indictment or otherwise, and that his speedy trial claim should be denied.

Since the court's instructions to the jury were not objected to by either party at the trial and defendant has pointed to nothing in the instructions which might conceivably constitute plain error, it is assumed that defendant's principal claim of prejudicial error during the course of the trial will center around the court's alleged erroneous evidentiary rulings. The two principal exceptions taken were to the court's refusal to admit testimony of witnesses to statements made out of court by the defendant's witness, Helena Stoeckley, and its refusal to admit the testimony of a psychiatrist, one Dr. Sadoff. The bases of the court's rulings on these two questions were dictated into the record at trial, see Transcripts for August 20, 1979 (Stoeckley) and August 22, 1979 (Sadoff), but it was indicated at the time that the court might elaborate further on its rulings in writing as soon as time should permit. This will now be done.

The Stoeckley Witnesses. Helena Stoeckley, an acknowledged drug addict, was living in Fayetteville at the time of the murders in question in February, 1970, as a fairly well-known member of the drug culture. Colonel Rock, who conducted the Article 32 proceedings for the Army in 1970, had recommended that Stoeckley be investigated as a possible suspect in the MacDonald murders. Apparently this was based on the fact that this drug-addicted girl had engaged in some rather bizarre behavior shortly after the murders and had been unable to account for her whereabouts for about four hours on the early morning of February 17, 1970, during which time the murders occurred. She reportedly made statements to the effect that she thought she might have been in the MacDonald home at the time of the crimes, and there was evidence to the effect that she obtained some funeral wreaths from a florist shop near her residence and wore black for a while as if she were in mourning for the murder victims. There was also evidence that she had a long blond wig and a "floppy" hat and boots which in some respects seemed similar to those allegedly worn by one of the intruders claimed by defendant MacDonald to have committed the murders of his wife and two young daughters.

Stoeckley was located during the course of the trial at a place in South Carolina near Greenville and because of her reluctance to come to court in obedience to a subpoena the court ordered her taken into custody and brought to Raleigh to testify on behalf of the defendant. Upon her arrival counsel for defendant asked for a short recess to interview Stoeckley, and this stretched into almost an entire day of conferences between defense counsel, Stoeckley and a number of witnesses to whom she had allegedly made statements of one kind or another over the nine and one-half years which have elapsed since the murders in which she would indicate some possibility of her own involvement in these crimes.

On the following day Stoeckley was put on the stand by defense counsel and questioned at considerable length about her knowledge of the MacDonald murders. The substance of her testimony was that she was not involved in the murders but that because of her drug-crazed condition she had at least come to wonder whether or not she was in fact involved, and she admitted to owning the clothing referred to above and the fact that she seemed to go into mourning following the murders. The court gained the unmistakable impression which it believes was shared by the jury that this pathetic figure was suffering from drug-induced mental distortion and that she could be of no help to either side in the case.

The defendant next took the voir dire testimony of a half dozen or more witnesses to whom Stoeckley had made statements relating to the MacDonald murders beginning with a Fayetteville detective who interviewed her within a few days after the murders and ending with witnesses including members of defense counsel's staff who interviewed Stoeckley on the day she arrived in Raleigh to testify.

Several of these witnesses talked to Stoeckley in Nashville, Tennessee where she was living in the fall of 1970 and the early part of 1971. When she would talk to these witnesses she would sometimes be "hysterical", "crying", and "blubbering". She would say things like "I don't know whether I did it or not." She told one witness that she remembered being at the MacDonald home, that she knew who did it but that she did not do it herself, that she remembered nothing about the evening, that MacDonald himself did the killings and that she was unable to describe anything inside the MacDonald apartment. She was under the influence of drugs at times when she talked to this witness but at other times she was not under the influence of drugs. She was interviewed by a CID agent on April 23 and April 24 of 1974 and told him that she was convinced that she had participated in these crimes for three or four months but was now of the opinion that she was present but did not participate. She was under the influence of narcotics the first day she talked to the CID agent but was "better" on the next day when she retracted everything she had told the agent on the previous day. This agent was unable to develop any information from Stoeckley showing that she really had any knowledge of the crime, and all the possible leads she was able to furnish were checked out and it was verified that the persons named by her were not involved.

The Fayetteville detective, one Beasley, interviewed Stoeckley at her home in Fayetteville between 2:30 and 3:00 a.m. on the morning of February 18, which was the day following the murders, and she told him at that time "in my mind it seems that I saw this thing happen," but she stated further that she was under the influence of the drug mescaline at the time and that she then backed off and would say no more. This officer held Stoeckley and several of her male companions for about an hour that morning after requesting his headquarters to contact the CID and have them come and interview these people, but when the CID agents did not arrive in about an hour the detective released these people and has never seen them again. Curiously, this officer's notes of his interviews with Stoeckley and her companions were lost or misplaced, and he has never seen them again. If it is within the province of this court to pass on the trustworthiness of a witness who proposes to testify as to statements of another witness allegedly qualifying as an exception to the hearsay rule, see *United States* v. *Satterfield,* 572 F.2d 687 at p. 69 (9th Cir. 1978), *cert. denied,* 99 S.Ct. 128, this court would be contrary to hold Officer Beasley's testimony to be unreliable. It is simply incredible that any self-respecting, competent police officer who really thought he had a substantial lead toward solving these sensational murders would allow the suspects to go after waiting only an hour for the Army investigators to come when he had had no direct contact with them himself and that he would never again pursue the lead on his own.

Statements allegedly made by Stoeckley to her neighbor, one Posey, were of the same equivocal character as the statements sought to be proven by the other witnesses referred to above. For reasons which were brought out more fully by the government's cross-examination of this witness, if required to do so this court would find his testimony untrustworthy.

The defendant sought to introduce testimony of these out-of-court statements by Stoeckley as exceptions to the hearsay rule under Rule 804(b) of the Federal Rules of Evidence, contending that they qualified as statements against Stoeckley's penal interest in view of Stoeckley's "unavailability as a witness." In view of Stoeckley's testimony that she had no recollection of the subject matter of at least some of her statements, the court was prepared to rule that she qualified as an unavailable witness under Rule 804(a)(3), and although it is a debatable proposition, the court was willing to assume arguendo that the statements were against Stoeckley's penal interest. The trouble with the proffered testimony, however, lies in its failure to meet the test of the second sentence of Rule 804(b)(3) which reads as follows:

> "A statement tending to expose the declarant to criminal liability and offer to exculpate the accused is not admissible unless corroborating circumstances clearly indicate the trustworthiness of the statement."

After studying the transcript of Stoeckley's own testimony and that of the proposed witnesses given on voir dire the court was convinced that far from being shown by corroborating circumstances to be clearly trustworthy, the alleged statements of Stoeckley were so clearly untrustworthy that the court should not hesitate to exercise its discretion to exclude the evidence under Rule 403, F.R.E., which provides:

> "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence."

That the determination of admissibility under Rule 804(b)(3) is left to the discretion of the trial court is hardly open to question, *United States* v. *Guillette*, 547 F.2d 743 (2nd Cir. 1976); *United States* v. *Ropeza*, 564 F.2d 316, 325 (9th Cir. 1977), and the standard for appellate review is whether or not the discretion was abused. *United States* v. *Bagley*, 537 F.2d 162, 166-167 (5th Cir. 1976).

The closest case on the facts which the court was able to find was *United States* v. *Satterfield*, 572 F.2d 687 (9th Cir. 1978), *cert. denied*, 99 S.Ct. 128. In that case the witness took the Fifth Amendment and therefore made himself unavailable. In sustaining the trial court's ruling excluding testimony about an alleged statement made out of court by the witness because clear circumstances corroborating the veracity of the witness were absent, the court listed some of the circumstances which tended to corroborate the trustworthiness of the statement and others which indicated that the statements were untrustworthy. The court said:

> "Under Rule 804(b)(3), the corroborating circumstances must do more than tend to indicate the trustworthiness of the statement; they must *clearly* indicate it. There is good reason to believe that [the witness] staged the argument with [the defendant's] help and that his alleged statements . . . were also fabricated. The trial court did not abuse its discretion in denying [defendant's] motion to admit this evidence." *Id.* p. 693.

In assessing the trustworthiness of statements of the kind sought to be introduced here the court must inquire into the reliability of and the necessity for the statement. *United States* v. *Carlson,* 547 F.2d 1346 (8th Cir. 1976), *cert. denied,* 431 U.S. 914. Here the statements of Stoeckley were anything but reliable, and no necessity for her making the statements was ever shown. To the contrary, it appears that for the most part the statements were made by her voluntarily while she was under the influence of powerful narcotics.

The case relied upon by defendant, *Chambers* v. *Mississippi,* 410 U.S. 284 (1973), is clearly distinguishable. In that case the hearsay statements of the declarant were originally made and subsequently offered at the trial under circumstances that provided assurance as to their trustworthiness. The statements consisted of the confessions made spontaneously by the declarant to a close acquaintance shortly after the crime had occurred; the statements were corroborated by other evidence in the case including the declarant's sworn confession which he later repudiated, the testimony of an eye witness to the murder, the testimony that the declarant was seen with a gun immediately thereafter and proof that the declarant owned a weapon of the kind involved in the crime. Moreover, "[t]he sheer number of independent confessions provided additional corroboration for each" and "each confession here was in a very real sense self-incriminatory and unquestionably against interest." 410 U.S. 300-301. Nothing remotely resembling such corroborating circumstance is present in the case at bar.

As an alternative ground for the admission of the out-of-court statements of Stoeckley defendant argued that the statements were admissible for impeachment purposes under Rule 613, F.R.E. The court had the definite feeling that the real purpose of counsel in endeavoring to get the evidence in as impeachment was simply to get it before the jury, and if this is so the evidence was properly excluded under *United States* v. *Morlang*, 531 F.2d 183, 190 (4th Cir. 1975), where it was said:

> "The overwhelming weight of authority is . . . that impeachment by prior inconsistent statement may not be permitted where employed as a mere subterfuge to get before the jury evidence not otherwise admissible."

In that case it was recognized that the danger of confusion, even where the evidence is limited to impeachment, may be so great as to upset the balance and warrant its exclusion. Authority for exclusion of such evidence is now contained in Rule 403, F.R.E.

The court chose to exclude the evidence on other grounds. To begin with, in order to impeach a witness by a prior statement there must in fact be testimony which is inconsistent with the prior statement. *Gilmour* v. *Strescon Industries, Inc.*, 66 F.R.D. 146 (E.D.Pa. 1975), *aff'd*, 521 F. 1398 (3rd Cir. 1975).

> "Any statement is inconsistent if under any rational theory it might lead to any relevant conclusion different from any other relevant conclusion resulting from anything the witness has said." 3 Weinstein's Evidence, 613-11.

The alleged statements made by Stoeckley are in some instances at variance with her sworn testimony given at the trial in this case, but by the same token the statements in some respects are entirely consistent with testimony given at the trial by Stoeckley. And so we were simply left with conflicting statements made by Stoeckley to the same witness, and to have allowed such statements to be admitted could only have added to the confusion already engendered by her own vague and totally untrustworthy testimony which she had given from the witness stand.

The Psychiatric Testimony. The defendant proffered the testimony of a forensic psychiatrist, Dr. Robert L. Sadoff, who apparently proposed to give testimony as follows:

> "That it is recognized and accepted by reputable specialists in the field of forensic psychiatry that certain personality/emotional configurations are identifiable in human beings which, because of the mental disorders involved, are indicative of a capability or disposition to certain

> types of anti-social conduct, including the commission of homicides involving extreme brutality to one's own spouse and small children and other crimes of violence; and that, conversely, other personality/emotional configurations are identifiable which are inconsistent with such anti-social behavior.
>
> "That based on his psychiatric examination of the defendant, it is his opinion of the character of Dr. MacDonald that the defendant was and is a man who is not given to extraordinary violent outbursts of physical violence against his wife and children; that he was and is an emotionally normal, mentally stable man, neither evasive nor apparently untruthful about the significant events of his life, including the murders of his family, who did not possess the type of personality/emotional configuration that would be consistent with and/or manifests this type of murderous assault on his wife and small children."

This evidence was sought to be introduced under Rule 404(a)(1) of the Federal Rules of Evidence which declares admissible evidence of a pertinent trait of the character of an accused for the purpose of proving that he acted in conformity therewith on a particular occasion. Defendant contended that the proffered psychiatric testimony would show that the defendant "was a well-adjusted man, without violent tendencies" and would "establish a personality configuration inconsistent with the outrageous and senseless murders of defendant's family."

Numerous lay witnesses most of whom were highly intelligent and articulate professional and business people, had already testified to the defendant's character traits of peacefulness, non-violence, rationality and compassion for his fellow man, but it was the position of the defendant that the opinion of a qualified psychiatrist based on his examination of the defendant might well be more reliable evidence of character than that of even the most perceptive lay observer. Defendant points to a note by the Advisory Committee to Rule 405, F.R.E., which he contends expressly sanctions the introduction of such psychiatric opinion testimony. The note reads in pertinent part as follows:

> "If character is defined as the kind of person one is, then account must be taken of varying ways of arriving at the estimate. These may range from the opinion of the employer who has found the man honest to the opinion of the psychiatrist based upon examination and testing. No effective dividing line exists between character and mental capacity, and the latter traditionally has been provable by opinion."

In ruling on the admissibility of this proffered expert testimony the court indicated that it would allow testimony by Dr. Sadoff as to the defendant's character traits such as peacefulness and non-violence which would be inconsistent with the commission of the crimes in question, but that it had been concluded following a study of the pertinent authorities that the proffered testimony to the effect that "certain personality/emotional configurations are identifiable in human beings which, because of the mental disorders involved, are indicative of a capability or disposition to certain types of anti-social conduct including the commission of crimes of the type here involved" should not be admitted. Several reasons led the court to this conclusion.

The legal principles applicable have been stated in *United States* v. *Amaral*, 488 F.2d 1148 (9th Cir. 1973), as follows:

> "The basic purpose of any proffered evidence is to facilitate the acquisition of knowledge by the triers of fact thus enabling them to reach a final determination. As often stated, our system of evidence rests on two axioms: Only facts having rational probative value are admissible and all facts having rational probative value are admissible unless some specific policy forbids. . . . Evidence which has any tendency in reason to prove any material fact has rational probative value.
>
> "The general test regarding the admissibility of expert testimony is whether the jury can receive 'appreciable help' from such testimony. . . . The balance of the probative value of the tendered expert testimony evidence against its prejudicial effect is committed to the 'broad discretion' of the trial judge and his action will not be disturbed unless manifestly erroneous. . . .
>
> "The countervailing considerations most often noted to exclude what is relevant and material evidence are the risk that admission will (1) require undue consumption of time, (2) create a substantial danger of undue prejudice or of confusing the issues or of misleading the jury, (3) or unfairly and harmfully surprise a party who has not had a reasonable opportunity to anticipate the evidence submitted. Scientific or expert testimony particularly courts the second danger because of its aura of special reliability and trustworthiness.

> "Because of the peculiar risks of expert testimony, courts have imposed an additional test, i.e., that the testimony be in accordance with a generally accepted explanatory theory." *Id.*, p. 1152.

The court assumed that Dr. Sadoff could qualify as an expert in in forensic psychiatry, but proof that his proffered testimony would conform to a generally accepted explanatory theory was lacking. In his brief the defendant cited several articles in psychiatric journals which were said to deal with this subject, but the articles were not made available to the court, and with the possible exception of the case of *United States* v. *Staggs*, 553 F.2d 1073 (7th Cir. 1977), the court was not cited any case decided under the Federal Rules of Evidence supporting the admissibility of psychiatric testimony of the type sought to be introduced here. The government, on the other hand, has cited an article by an Assistant Professor of Psychiatry at UCLA entitled "A Critique of the Psychiatrist's Role as Expert Witness," 12 Journal for Science 172 (1967), from which the following quote is taken:

> "It is not possible, nor is it likely in the near future, for a psychiatrist who first sees the patient some time, often months, after the offense, to give specific information about the mental state of the defendant at the time of the offense. However, the moment that the psychiatrist is pressed to give his opinion, which is no more than his personal guess or moral conviction, there suddenly appears something interpreted as tangible and scientific. Under the guise of science, part or all of the responsibility for the difficult issue of criminal responsibility is thus handed over to the psychiatrist."

Evidence is not necessarily admissible simply because the witness purports to base his testimony on an ostensibly scientific principle. The principle must be sufficiently established to have gained general acceptance in the particular field to which it belongs. *United States* v. *Brown*, 557 F.2d 541, 556 (6th Cir. 1977). Moreover, the opinion of an expert because of its seeming objectivity is apt to carry undue weight, so not every ostensibly scientific technique should be recognized as the basis of expert testimony. *United States* v. *Baller*, 519 F.2d 463, 466 (4th Cir. 1975).

> "In order to prevent deception or mistake and to allow the possibility of effective response, there must be a demonstrable, objective procedure for reaching the opinion and qualified persons who can either duplicate the result or criticize the means by which it was reached, drawing their own conclusions from the underlying facts." *Id.*, p. 466.

In *United States* v. *Brown*, *supra*, the court rejected the government's proffered expert testimony demonstrating that ion microprobic analysis of human hair had reached a level of general acceptance in the field to make it a sufficiently reliable and accurate means for expert identification of hair. The court said:

> "While it is a truism that every useful new development must have its first day in court. . ., expert testimony on a critical fact relating to guilt or innocence is not admissible unless the principle upon which it is based has attained general acceptance in the scientific community and it not mere speculation or conjecture." *Id.*, pp. 558-9.

Our case here was further complicated by the fact that the government's own forensic psychiatrist had examined the defendant and had reached conclusions diametrically opposed to those of Dr. Sadoff. The report of this expert which has been furnished counsel for defendant and to the court for its in camera review tends to indicate that the defendant does indeed possess those traits of character which are consistent with his commission of the crimes with which he is charged and that he possesses other traits which tend to cast serious doubt on the credibility of his explanation of how the crimes occurred.

The result was that we had shaping up a "battle of the experts" referred to by Weinstein in his work on *Evidence*, Section 405[03], 405-34, where he quotes from an article by Falknor and Steffen entitled "Evidence of Character: From the 'Crucible of the Community' to the 'Couch of the Psychiatrist' ", 102 Univ. of Pa. L.Rev. 980, 994 (1954) as follows:

> "Even in the case of strictly medical testimony, where the issue concerns physical rather than mental or psychological condition or disability—'objective' rather than 'subjective' symptoms—experience has demonstrated the commonness of disagreement among the 'experts.' When the inquiry is centered on an intangible, impalpable, wholly subjective thing like state of mind, personality or 'propensity,' the likelihood of disagreement is greatly enhanced. Thus there is point to the conclusion of the New Mexico court to the effect that it was 'unwilling to enlarge the already immense field where medical experts, apparently equally qualified, express such diametrically opposite views on the same facts and conditions,' to the 'bewilderment of the fact finder.' "

In view of all of these considerations the court concluded that irrespective of the admissibility of the proffered evidence under Rules 404 and 405, F.R.E., the probative value of the evidence was substantially outweighed by the danger of unfair prejudice, confusion of the issues and misleading the jury and that it should be excluded under Rule 403. See further Wright & Graham, *Federal Practice & Procedure*, § 5265.

The defendant's proposed assignment of error based on the denial of defendant's motion for judgment of acquittal made at the close of the government's evidence (but not renewed, as the court recalls, at the close of all the evidence) is considered to be without merit. Although the introduction of evidence by the parties extended over the better part of six weeks and encompassed much highly technical and scientific evidence on each side, the one central question involved in the case from the beginning to the end was whether the jury would believe the defendant's story that the murders had been committed by four intruders who entered his home through an unlocked back door in the early morning hours of February 17, 1970. Selection of this jury extended over a period of three days, and while in the court's view the parties were entitled to only ten challenges each, at their insistence they were allowed twenty challenges each as provided in capital cases involving the death penalty. The result was the selection of a jury panel composed of intelligent, conscientious citizens from almost every walk of life who were obviously imbued with a serious sense of responsibility and who gave the case their undivided attention throughout the unusually long trial. Counsel for both sides agreed that it was a good jury, and the six and one-half hours of deliberations which they required to reach a verdict demonstrates that their task was not taken lightly. This jury obviously declined to accept Dr. MacDonald's story, and the result was the return of the guilty verdict. The court remains of opinion that the verdict was fully supported by the evidence and that the denial of the motion for judgment of acquittal was proper.

The court has considered the twelve additional proposed assignments of error relating principally to evidentiary rulings, and it would serve no useful purpose to examine these seriatim at this time. Suffice it to say that in those instances where objections were properly lodged and an explanation for the court's ruling was considered appropriate, the same will appear in the transcripts of the trial and the pre-trial proceedings. The court remains of opinion that these rulings were proper.

The court is fully cognizant of the fact, of course, that it is not its province to sit in appellate review of itself, and the elaboration herein on what it understands to be defendant's principal proposed assignments of error is intended only to comply with the court's intention expressed at trial to explicate some of its rulings more fully as soon as time should permit and to state additional reasons as to why the court has concluded not to allow bail pending appeal.

In summary, the court remains of opinion that no one or more conditions of release will reasonably insure that the defendant will not flee and that while defendant's appeal is certainly not frivolous, he has failed to demonstrate to this court that it has sufficient legal merit to create in the court a genuine concern that defendant will have wrongfully been held in custody pending his appeal. His motion for bail must therefore be and is hereby denied.

SO ORDERED as of September 7, 1979.

/s/ F. T. Dupree, Jr.
F. T. Dupree, Jr.
United States District Judge

APPENDIX E

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT
OF NORTH CAROLINA
FAYETTEVILLE DIVISION

No. 75-26-CR-3

UNITED STATES OF AMERICA, PLAINTIFF

vs.

JEFFREY R. MACDONALD, DEFENDANT

[Filed Sept. 14, 1979]

ORDER

Following the entry of judgment in this case the defendant filed on September 4, 1979, a motion pursuant to 28 U.S.C. § 2855 (ostensibly Section 2255) and Rule 48(b), F.R.Crim.P., to vacate the judgment of conviction and to dismiss the three-count murder indictment against defendant based on the government's alleged violation of defendant's right to a speedy trial as guaranteed by the Sixth Amendment to the United States Constitution. The government has filed a response to this motion on September 12, 1979.

Similar motions have been filed by defendant on several previous occasions prior to judgment, and on each occasion this court has overruled the motions.

For the reasons stated in the court's order denying bail entered as of September 7, 1979, this latest motion must also be and is hereby denied.

/s/ F. T. Dupree, Jr.
F. T. DUPREE, JR.
United States District Judge

September 14, 1979.

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Office-Supreme Court, U.S.
FILED
AUG 10 1981
ALEXANDER L. STEVAS,
CLERK

No. 80-1582

In the Supreme Court of the United States

OCTOBER TERM, 1980

UNITED STATES OF AMERICA,
Petitioner

v.

JEFFREY R. MACDONALD

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

JOINT APPENDIX

PETITION FOR CERTIORARI FILED MARCH 18, 1981
CERTIORARI GRANTED MAY 26, 1981

In the Supreme Court of the United States

OCTOBER TERM, 1980

No. 80-1582

UNITED STATES OF AMERICA,
Petitioner

v.

JEFFREY R. MACDONALD

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE FOURTH CIRCUIT

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UNITED STATES DISTRICT COURT

Criminal Docket 75-26-Cr-3

UNITED STATES OF AMERICA

v.

JEFFREY R. MACDONALD

RELEVANT DOCKET ENTRIES

DATE	PROCEEDINGS
1/24/75	Indictment filed.
1/24/75	Warrant for arrest issued.
4/8/75	Notice of motion to dismiss the indictment for denial of right to speedy prosecution and trial filed.
5/2/75	Defendant's memorandum of law in support of motion to dismiss indictment for denial of right to speedy prosecution and trial filed.
5/5/75	Hearing on motions conducted.
5/23/75	Defendant arraigned and entered plea of not guilty.
7/29/75	Motion to dismiss indictment for denial of right to speedy prosecution and trial denied.
7/29/75	Case set for trial on 8/18/75.
8/8/75	Notice of appeal from order denying defense motions filed.
8/11/75	Record on appeal mailed to Fourth Circuit.
8/18/75	Certified copy of court of appeals' stay order and order allowing appeal filed.

DATE	PROCEEDINGS
1/26/76	Opinion of Fourth Circuit ordering dismissal of the indictment with prejudice for Sixth Amendment speedy trial violations filed.
6/23/76	Copy of order of Fourth Circuit ordering that the mandate be stayed pending application of the appellee in Supreme Court for a writ of certiorari filed.
6/28/77	Record on appeal forwarded to Fourth Circuit upon request because petition for writ of certiorari granted.
6/12/78	Mandate from Fourth Circuit court of appeals ordering that cause be remanded to district court for further proceedings in conformity with the opinion of the Supreme Court.
6/20/78	Order from Fourth Circuit staying order remanding case to the district court pending submission of supplemental briefs on denial of motion to dismiss due to double jeopardy.
10/31/78	Published opinion from Fourth Circuit Court of Appeals affirming order denying McDonald's plea of double jeopardy and remanding to district court for further proceedings.
3/28/79	Order issued setting trial for 4/23/79.
4/18/79	Motion to continue trial from 4/23/79 to some subsequent date filed.
5/8/79	Stipulation and agreement to continuance of case signed by both parties.
6/28/79	Notice to appear issued—case set for jury trial on 7/16/79.
7/13/79	Motion to dismiss indictment because of denial of defendant's right to speedy trial filed.
8/29/79	Jury verdict—Count 1—guilty to second degree murder; count 2—guilty to second degree murder;—Count 3—guilty to first degree murder.

DATE	PROCEEDINGS
8/29/79	Judgment and probation/commitment order—Count 1—period of defendant's natural life; Count 2 period of defendant's natural life, the sentence to run consecutively with the sentence imposed on count 1; Count 3—period at defendant's natural life, the sentence to run consecutively with the sentence imposed on Count 2.
9/4/79	Motion to vacate judgment of conviction and dismiss indictment [for denial of right to speedy trial] filed.
9/7/79	Notice of appeal filed.
9/14/79	Motion for bail denied.
9/14/79	Motion to vacate judgment of conviction and dismiss the indictment denied for reasons stated in the court's order denying bail.
10/19/79	Record on appeal mailed to Fourth Circuit.

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Docket No. 795253

UNITED STATES OF AMERICA, APPELLEE

v.

JEFFREY R. MACDONALD, APPELLANT

SUMMARY OF EVENTS

ARGUMENT: 2/5/80

OPINION: 7/29/80

JUDGMENT: 7/29/80

DISPOSITION: Reversed and Remanded/Rehearing Denied

PETITION FOR REHEARING: 8/18/80

MANDATE ISSUED: 12/26/80

DATE	FILINGS-PROCEEDINGS
9/11/79	Case docketed
11/16/79	Order denying bail pending appeal filed.
11/16/79	Appellant's brief due 11/27/79; appellee's 21 days afterwards.
8/18/80	Petition for rehearing with suggestion for rehearing en banc filed.
12/18/80	Per curiam opinion denying rehearing and rehearing en banc filed.

ARTICLE 32

TESTIMONY OF WILLIAM E. POSEY

* * * * *

[1298] Q: Did you have any occasion to become awake or to awake on February 17?

A: Well, about—sometime between a quarter to four and four-thirty, I didn't look at the time, exactly what time it was, but I started to go to the restroom. I heard a car next door whip in, you know, real fast. There was this—

MR SEGAL: You'll have to try and talk just a little slower for purpose of both clarity, understanding what you are saying, and to enable the recorder to pick it up. You tend to talk a little rapidly. You say you went to the rest room?

A: I was fixing to get up to go the restrooms, and all of a sudden I heard a car whip in. There was a lot of laughing and carrying on, so I walked around to my front door to see what was going on.

Q: And may I ask you, where did you hear the sound of the car from—was it from the street?

A: From my bedroom I heard it, you know, pull into the drive way real fast.

Q: That drive way was located between what properties?

A: Right between my house and the girls that lived in the apartment right across the fence.

Q: Are you referring to some girls that live in the adjoining building?

A: No, no, it's—you can look out—their house is separate from mine. It was directly across from our front door.

Q: And you say some girls. Did you know the occupants of the apartment?

A: Well, I knew them by, you know, just saying hello, and talking to them occasionally, but I mean I wasn't associated, real good friends, or anything.

Q: Now what happened when you heard this sound of the car pulling into the drive way and the voices? By the way, can you describe what the voices were saying or how they sounded?

[1299] A: No, they were just, you know, laughing, you know. I didn't pay any attention to what they were saying. I don't believe they were saying too much, really. Just laughing, cutting up, giggling a lot. This type of thing.

Q: Giggling a lot?

A: Yes.

Q: Could you indicate this to approximately how many voices there appeared to be?

A: Well, there was more than two, and there was more than two people in the car. It was—it was a crowd.

Q: Now as a result of hearing that particular noise or those sounds, what did you do?

A: Well, I walked around to my front door to see what was going on, and I noticed that the lights and everything were on in the apartment—in their apartment and I looked over there and two of the girls were in there painting, and then I saw—I looked up and I saw the car that was pulled in. It was a Mustang, and the one girl got out, and the girl I know—

Q: Excuse me. You said two girls were in the apartment painting?

A: Painting, yes.

Q: Are you indicating there were more than two occupants in that apartment?

A: There was three.

Q: And was the third occupant also female?

A: They were all three female.

Q: All right, now where was this third female?

A: She was getting out of the car and walking into the house, and then the car pulled out and took off.

Q: Now, what, if anything, did you observe about her at that time? Her appearance or dress.

A: Well, the only thing that I noticed about her, at least, I noticed it was her. and she had something in her hand, but I—I did not take note of what it was, but she walked kind of fast into her house. She didn't walk real fast, but faster than she usually walks.

[1300] Q: Now what did that young lady look like at that time?

A: She just looked like, you know, she didn't look any certain way. I didn't—I just noticed it was her, because she didn't have a hat or anything like that on at that time. She had her—she has brunette hair, and I guess it was down close to her shoulders.

Q: Now what, if anything, caused this episode to remain in your memory, that caused you to pay any note to it?

A: Well, I had to get up, you know, pretty early and go to work, and Gene, the man I worked with, we were headed to Southern Pines, going through Fort Bragg, and he told me that there had been a murder out there that night, you know, several people had been killed, and so, when he told me this, you know, and he said it was by a band of hippies, you know, and I knew—it went through my mind then, you know, that she was out. It was unusual for her to be out that, roaming around that time of the night, and it just stayed in the back of my mind. I just let it go there.

Q: All right now, would you describe for the investigating officer, the clothes or other paraphanalia that your neighbor wore, her normal habit, her normal wear?

A: Well, like before—

CPT SOMERS: I object to that, as calling for a conclusion. We have no basis for his being able to draw.

MR SEGAL: Well, if he wants to establish how long he's observed the person, I'll be glad to do that, although the government knows itself, but I'll be able to do so.

CPT BEALE: Establish it.

Q: Let me back up, if I may, Mr. Posey. How long had you seen this gal around or known her, the one that you are describing on this morning, that you saw getting out of the Mustang?

A: I'd seen her, you know, everyday, when I would come home from work, and a lot at night, and probably,

I think, they had lived there for two or three months prior to that, and I think I'd seen her once or twice in Haymount, you know, before they ever even moved there.
[1301] Q: And how frequently did you see her on a given day? One occasion or more than one occasion?

A: I'd say maybe twice a day.

Q: Now can you tell us something about what the Haymount section of—is or what kind of community it is?

A: It's where most of the hippies hang out at.

Q: And on the various occasions that you had seen this young lady before the morning of the 17th of February, would you describe, you know, what her normal wearing apparel was?

A: Well, she had this purple outfit, you know, with the vest type thing that she wore all the time. It was kind of silky, and she had a big old white floppy hat that she wore, and she had a pair of white boots that she wore a lot, and she used to—I mean the hat was part of her because you very seldom, you know, when she went out she always had the hat with her. I mean very seldom did you see her without the hat, and on once or twice she had worn a blond wig, you know, she had a blond wig too, and she had worn it once or twice, but she didn't wear it too often, not real regular.

CPT SOMERS: I object to the testimony about the blond wig since that's obviously not normal wearing apparel.

MR SEGAL: I agree it is not normal wearing apparel. That's exactly why it is relevant testimony. We will establish certain subsequent events relating to that—the clothing and the hair.

CPT BEALE: The objection is overruled, Captain Somers.

Q: Now you said something about the fact that you had seen this floppy hat which she wore on more than one occasion?

A: Yes, sir.

Q: How often would you say that she wore or had that hat with her?

A: Just about every time that she went out the door she had it.

Q: And could you describe anything about that hat, other than the fact that you recall a floppy hat?

A: Well, it was big, you know, it was kind of wide, you know, floppy, the type that flopped around—around the ears, and the thing went around the front.

[1302] Q: You mean the brim, you are referring to?

A: Yeah, but you know, it hung down around the front.

Q: Do you know what color it was?

A: It was white.

Q: Was she in the habit of also wearing the boots that you described?

A: She didn't wear the boots that often. She usually went barefooted most of the time.

Q: Did you ever see her in any other shoes, other than the boots?

A: I seen her—Well, I've seen her, you know, in sandles and stuff like this.

Q: Now do you know whether any particular type of weather conditions or the time of the year when she would wear the boots?

A: Well, usually she'd wear the boots a lot of the times when it was wet, or when she was going, you know, like to a party or something like this. When she wore a dress she would wear the boots.

Q: Now what was the weather condition on that morning? Do you recall?

A: It was fairly, you know, it was fairly cold.

Q: And was there anything else that you observed about the weather at that time?

A: Not that morning.

Q: Now did you have any occasion to mention the episode at the time it happened to any other person, your observance of the girl coming into the drive way at that time of the morning?

A: Well, you know, they've done a lot of crazy things over there, but that was about the craziest thing I'd seen them, painting away at that time in the morning, so, I, you know, I got my wife up and I—I brought her over to the front door to show her what was going on, and the only thing she—she saw was when the car was backing up, I woke her up, she saw the car backing out, and I showed her them over there painting the apartment at that time in the morning.

Q: Had you ever seen that particular car there on any other occasion?

A: Well, it—I'd seen the Mustang there a lot of times, it was a blue one, but I can't remember if that was the color of that car that [1303] morning, but I know it was a Mustang because I remember the shape of the car and everything, but I didn't take note of what color it was.

Q: Did you observe the persons who were in the Mustang that morning?

A: No, sir.

Q: Do you know whether there was one or more persons in it when it drove off?

A: There was at least two in it when it drove off because they, you know, laughing and stuff.

Q: Did they appear to you, from what you saw and what you heard, from the voices, that they were males or females?

A: By their voices, by the way they were giggling, they were males.

Q: Do you know what connection, if any, that young woman you've described with a floppy hat, has ever had with Fort Bragg, North Carolina.

A: Her father was Colonel in the Army, and—

Q: Is he still a member of the Army?

A: No, he's retired.

Q: And did you ever meet her father?

A: I met him on one occasion. Shortly after that she left and he come looking for her. He was looking for her.

Q: How old a young woman is she?

A: I think she's somewhere in the neighborhood of around 18, because she looks older than her actual age.

Q: Now on the subsequent days, after February 17th, when Mrs MacDonald—when the MacDonald killing was out, did you observe or see anything about this young lady in regard, first of all, to her clothing?

A: Well, I noticed that she quit wearing her hat. I didn't see her hat after that, and she never wore her hat any more after that at all.

Q: And prior to February 17th, did you ever recall having seen her without that particular hat that she wore?

A: Oh, I'd seen her, you know, a lot of times, without it, but most of the times she had it.

[1304] Q: And did you ever have occasion to discuss that fact that you didn't see her with it after February 17th?

CPT SOMERS: I object.

CPT BEALE: What is your basis?

CPT SOMERS: Hearsay.

MR SEGAL: It is not offered for the truth or falsity of what she said but the observation and what was said that he acted on thereafter.

CPT BEALE: Overruled.

Q: Now did you have any conversations with this young woman?

A: Well, about a week or two after, a friend of hers who was a friend of mine, Paul Bowman, he was getting out of the Army, and I owed him some money for a telephone bill, and so he was, you know, over there with them, and so he was by the fence and I saw him. My wife and I were in the house and I went out to talk to him and my wife was standing on the porch. I started talking to him, and then we got on the subject about—

she said that the police had questioned her several times about it, and so he said that she needed an alibi, and then she had walked up, you know, in the meantime, with the three of us standing there, and they were both on the other side of the fence, and so I said "Well, I could be your alibi, because I saw your girl friends painting in their apartment, and I saw you when you got out of the car that morning."

Q: Did she, herself, ever say anything about an alibi on the morning of February 17th?

A: Well, you know, you know, she—she said that she had been questioned several times, that she was stoned out that night and that she didn't remember what she had done.

Q: Let's break that down, first of all. Did she, in fact, indicate that she had been questioned by police and other law enforcement authorities about her whereabouts on the morning of 17 February?

A: Yes, sir.

Q: What did she indicate as to her ability to establish where she was on that morning?

[1305] A: She said that she didn't know where she was that morning.

Q: Did she ever use the word alibi, or the word abili come up in her presence?

A: Paul, you know, brought up the word alibi. He said that she needed an alibi. He said that she needed an alibi.

Q: And what, if anything, did you say or do in response to his statement, that he thought she needed an alibi?

A: Well, I made the remark, I said "Well, I can be her alibi because I saw her that morning. I saw her two girl friends painting the apartment, then I saw her when she come up and joined them, you know." And then when I said that, she kind of backed off, and they had to go, they left, they left, they just dropped the subject then.

Q: What was your relationship with this young lady after the morning, after the day that you told her that you had seen her on the morning of 17 February?

A: Well, I mean, she kind of shied away from me then, and then she left shortly after that.

Q: How long after that particular conversation did she leave?

A: It was within a few days.

Q: You say she left. She moved away from there?

A: She left completely.

Q: Did you ever have any discussions with her about the hat and the wig that you'd seen her with?

A: Yeah, I, on occasion, you know—

Q: Which occasion are you referring to?

A: The one where about the alibi, you know, and she said, she made a remark—what made it look bad was that she didn't—she threw her hat and her boots away, and I asked her, I said "What did you do with them?" She said she threw them away but she didn't remember what she'd done with them. But her wig, she said she still had it, that blond wig.

Q: Did you question her further about the location of the—or the method by which she disposed of her hats and her boots?

[1306] A: I asked her, you know, what she did with them, and she just kept saying she didn't remember what she'd done with them.

Q: Had you ever seen her with her boots and her hat after that morning, February 17th?

A: No.

Q: Did she describe anything about the condition of her boots at the time she disposed of them?

A: Well, I had talked to her, you know, about two nights ago. She had just got back in town, and I went up to Haymount to try to find her name, to try to find out what her name was, and I was talking to her, and she had mentioned that when she got rid of her boots, I said "Why did you get rid of your boots?" you know, and she said "Well, the heel was broken, I broke the heel" and she said they were awful muddy at that time.

Q: Now what was it that got you so interested or caused you to pay attention to the fact that the people next door were painting their apartment at 4 a.m. in the morning on the 17th? What was there that struck you about the episode—you woke up and you saw these girls painting the apartment?

A: You know, I mean, they didn't usually keep hours like that, way down in the morning, I mean they, it wasn't part of her to be out running around that time of the morning.

Q: Did she discuss with you—did the young lady discuss with you her condition, her physical or mental condition, on the morning of 17th of February when you talked to her?

A: Well, she said—she had said that she was stoned, and I asked her what she was using that night, if she was on acid or what, and she said mescaline. I said didn't she remember what she did, and she said that she had been stoned a hundred times on acid and all of it, you know, but she said that was the only night that she couldn't remember anything that had happened during the course of the night after she got stoned, and she said that since that time that she hadn't tried any of it, and had been off of it.

[1307] Q: When you say she had not tried any of it, do you mean she was referring to the fact that she had tried—

A: Dropped acid, shot mescaline or anything.

Q: But when you say stoned, perhaps it would be helpful to me if you gave a kind of description of what you understood that term to mean.

A: Well, when you are stoned, you know, you—you are out of the world. You are on your own.

Q: And that effect of being stoned, how is it achieved? How does one become stoned?

A: Either drop acid or shoot speed or something.

Q: What do you mean, drop acid?

A: Take acid.

Q: And acid is what? LSD?

A: LSD.

Q: Now what about mescaline? Do you know what mescaline is?

A: I'm not familiar with it. I've heard it when I was at college and I know a few people that used it, but I didn't know what it was.

Q: Did she indicate at what time she had taken the mescaline on or about 17 February?

A: No.

Q: Did she indicate at all that she had known where she had been prior to the time she came home in the Mustang that morning?

A: She said that the only thing that she could remember, she told me, was that she, you know, they were riding around. That's all she could remember, riding around, and she couldn't remember anything else.

Q: Did she remember or ever mention to you who the other persons that she was with when she was driving around in this Mustang?

A: No.

Q: Now did she do anything else in regard to what she wore after February 17th, that you observed?

A: Well, after then, you know, like she had worn this purple outfit quite a bit. Her choice, I guess, were limited, because she didn't have that many, but after that she started wearing black all the time. [1308] Like now, when you see her, she has nothing but black on, which is part of her dress.

Q: Are you aware of the day on which Mrs Colette MacDonald and the MacDonald children were buried?

A: Well, you know, I wasn't—know the exact date, but then I sat in my house, and the paper said they were having the funeral services out here at Fort Bragg, but during the day I noticed that the girl, that girl, she had wore black and had a black—

CPT SOMERS: Excuse me. I object to that. It's not responsive.

CPT BEALE: Overruled, answer the question.

A: She wore a black dress that day with black shoes and she wore a thing over her face, a vail, a black vail over her face, and had one of those things you use on a grave, a big old artificial flower thing, wreath, they had a wreath outside her door, and she sat there and—it was unusual for her too, because most of the time she, she was the type that was always going, wanting to go somewhere, go go. But that day she wouldn't go with anybody. She stayed in the apartment by herself all day. She just sat in there all day long.

Q: And that is the day in which you became aware that a funeral service was being held here at Fort Bragg?

A: Yes.

Q: Had you ever seen her in that kind of get up at all before?

A: That was quite contrary to the way she usually dressed. She never dressed like that before.

Q: And after the day that the MacDonald funeral, did she wear black clothing thereafter?

A: Well, after that day she left, you know, about a day or so later, and I've only seen her twice since then. On both occasions that I have seen her, she had black on. She wore nothing but black.

* * * *

[1312] Q: Did you ever have occasion to be in the presence of this young lady when there were police or other law enforcement officers nearby?

A: No, I just—I saw her get busted one day, but that's all.

Q: Did you ever hear her comment about police and what terms did she use to refer to law enforcement people?

A: She calls them pigs.

Q: Have you heard her say that recently?

A: Well, like night before last, a policeman passed by in a car and she said "Check the pig wagon out," and she pointed to the cop.

Q: Mr Posey, I want to show you an exhibit that's been previously marked in this case, A-31, and ask you whether this resembles any person that you know?

A: It resembles her in the way of the hat and the eyes, and this, you know, that's the type of the long straight blond wig, but her nose is big, like that, but it dosen't look like her chin.

Q: You disagree with the way the chin appears in this photo, rather this drawing, as you remember this girl?

A: Yeah, no, I mean—

Q: You disagree?

A: I do disagree with the chin, yes.

Q: May I have this drawing, sir, marked as Accused Exhibit 36, I believe.

MR SEGAL: I would state at this time that the exhibit that we've just had marked as A-36, was prepared in the same manner and fashion as the Exhibit A-31, by a former police artist pursuant to interviews and working with Captain MacDonald, and this drawing was prepared in the same fashion, except this is a photograph of the original. We are using a photograph at this time.

COL ROCK: On what date were these prepared, approximately?

[1313] MR SEGAL: August 8th and 9th of 1970.

COL ROCK: That will be entered as Accused Exhibit 36, drawing of man with mustache.

(A-36 was examined by counsel for the government.)

Questions by MR SEGAL:

Q: Mr Posey, I want to show you a copy of a drawing marked A-36 in this case, and ask you whether the face that appears in that drawing resembles any person you know?

A: It resembles the guy, you know, that used to drive the blue Mustang over there all the time. It doesn't look —the only thing, the mustache and the way his hair is. He always wore fly away collars, the kind that don't button down, they are always flopping around.

Q: . Like the collar is depicted here?

A: He was a, you know, a well built man. He wasn't fat or something. He was well built. He's maybe six foot tall.

Q: You say he's the man who always drove the Mustang?

A: Yes.

Q: Is that the type of car that resembles the car you found on the morning of 17 February, out of which the young lady got out?

A: It was the same type of car. It was one of those Mach I's.

MR SEGAL: Cross examine.

Questions by CPT SOMERS:

Q: How far away from the apartment that you were living in was the apartment of these girls?

A: Between, about fifteen and twenty feet.

Q: And what were the two girls doing, did you say, in the house on the morning of the 17th?

A: They were painting.

COL ROCK: Excuse me. What were they painting? Were they painting walls or were they painting pictures?

WIT: They were painting walls, but they weren't what you call wall paint—they were painting designs and stuff like this.

* * * *

[1316] Q: You saw this girl come in on the morning of the 17th. Did you see her when she went out?

A: No.

Q: Then you don't know what she was wearing when she went out?

A: No, sir.

Q: Now you say this girl told you she had thrown her hat and boots away. Is that correct?

A: Yes, sir.

Q: When did she throw her hat and boots away?

A: Well, about a week or two after that when I was —when Paul and I and her were talking, you know, she said that she had thrown them away, and it was prior to that, maybe inbetween that time and the murder, and up to that date, but she didn't say specifically at what time she had thrown them away.

Q: In other words, she had thrown them away between the 17th and the time you spoke to her?

A: Right. But she said that she was questioned, either a day or two days later she was questioned and she said that, you know, she didn't have her boots and her hat at that time either.

Q: You cannot describe the people that were in that Mustang. Is that correct?

A: No, sir.

Q: But you believe there were more than two in the car, two or more in the car when it left on the morning of the 17th?

A: Yes, sir, there was at least two in there because there was more than two voices coming from the car, at least two voices coming from the car.

Q: Now describe the discussion again concerning an alibi. Who first mentioned that word?

A: Paul Bowman, a friend of hers.

Q: And what did he say?

A: He said that, you know, she had been questioned three or four times and that she didn't know where she had been that night, that she was [1317] stoned and she needed an alibi, you know, and then I made a remark that I had seen her girl friends painting the apartment and I saw her get out of the car, get out of the car that morning, and I told him that I could be her alibi, so far as—

Q: And what did she say?

A: She didn't say nothing. She just kind of, you know, backed off and both of them dropped the conversation.

Q: When was the discussion about the boots and the hat?

A: That was earlier, earlier than the conversation, you know, when she said—when she had come up and told me that she had been questioned, you know, several times.

Q: Now you say she shied away. I believe that's one of the terms you used at the time you mentioned that?

A: Yes.

Q: Well, describe shied away.

A: Well, I mean like we were really having, doing a lot of discussion, and all of a sudden she just, they both just withdrew from me. They had to go—they had to leave.

Q: They both withdrew?

A: Well, she did first and then Paul dropped the conversation and he got on another topic and they both left.

Q: Was Paul in that Mustang or in that area the night that she came in?

A: I didn't see him.

Q: You say that she told you that she was driving around that night, and that's all she remembered. Is that correct?

A: That's all she said she could remember.

Q: Now as I understand it, you've seen her twice since the day of the 17th to talk to her, is that correct?

A: No, I said I've seen her—she stayed around there after that for awhile, but then she left and I've only seen her twice since she left.

Q: I see. And she was wearing black on both of those occasions?

A: On both occasions.

[1318] Q: What kind of black clothing are we talking about?

A: Well, like she used to wear all purple silky outfits with a vest and a white blouse, and those silky looking baggy pants, but now she wears the same type of clothing, but it's solid black, it's all black. I mean like the other night when I saw her, she had the same style of pants and vest, but the purple part was black.

Q: Did this girl ever say to you that she had been in the MacDonald apartment?

A: No, sir.

* * * *

[1327] Q: Did you observe any differences or changes in the attitude or behavior of this young woman before—from the time before February 17th, and the time after February 17th 1970?

A: Well, like before, she, she was always, you know, real gay and real happy, and like I'd come home from work and she'd say "Hi" you know, real loud and asked me how my day went and this type of thing, but like night before last when I saw her she looked all run down and she, she keeps to herself more. She's not with the group, like night before last all the group was down at Rowan Park and she was up there by herself.

Q: Did you observe that change in behavior after February 17th?

A: Well, I mean, you know, after that there wasn't no all night parties or anything going on over next door there. Everything was real quiet.

Q: Did she continue to go or associate with this same young man who had been her boy friend before February 17th, as she did after—

A: Not like she did before, you know, they were always together before but after that—in fact, I didn't even see him until, you know, just here recently. He didn't come over no more after that. The day that Mrs MacDonald was buried, he was over there.

Q: Did you ever hear her talk about killing other human beings?

A: Well, you know, like the night before last, I asked her, and we got to talking about the MacDonald thing and everything and I asked her, she told me she was stoned out, she didn't remember what she done, and I said, "Well, did you do it? Were you a part of it" and she says she doesn't know, she just drew a blank, but she said that she didn't think she could kill anyone because she wasn't that type of [1328] person that, you know, was hostile, and I said "Well, you could have just been holding the light", you know, and she kinda, you know, just nodded her head and let it go at that. But she made a remark, I asked her, I said, how was her and her boy friend doing, and she said they weren't getting along too well, and I asked her why, and she said "Well, we can't get married until we go out and kill some more people." She made that remark.

Q: Now I want to back up for just a second in regard to what you just told told us. Are you telling the investigating officer that two nights ago you asked this young lady directly whether or not she was involved in the killing in the MacDonald home?

A: Yes, sir.

Q: Now will you, better go over this quite slowing down—put the question, state the questions you posed to her, and tell us what she said, as much of her words as possible?

A: Well, you know, had been talking about it and I said, I asked her, had they questioned her any more about it, and she said no that she had been gone, she'd just got back in town, you know, and she told me that she was dying from hepatitis, kidney disease or something, and she said that she was supposed to die within a year, and so I asked her had they questioned her any more and she said no, and then I said, you know, I asked her if she was involved in it and she said she was stoned out on mescaline that night, and I said "Well, were you there? Did you do it?" and she said "I don't, you know, remember what I did that night." She said "I've been stoned on acid a dozen times" she said "But that night's the only night I can't remember exactly what I done" and so I says "Do you believe that you could have been involved in it?" and she said "Well, I don't believe that I could kill anyone because I don't have hostile tendencies." And I said "You could have just been holding the candle", and she kinda nodded her head.

[1329] Q: When you say "nodded her head", do you mean affirmative or negative?

A: Well, you know, just, you know, she didn't say yes, she didn't nod no or yes, either way, she just motioned her head.

COL ROCK: I'm sorry, which way did she motion her head?

WIT: It was an up and down motion.

COL ROCK: To you, would that normally mean that the individual agreed with you or disagreed with you?

WIT: I couldn't—I couldn't, it didn't—I mean, like she didn't want to answer it to me, in my opinion, because she didn't nod her head yes or no either way.

* * * *

[1333] MR. SEGAL: All right, thank you. You may cross examine. I beg your pardon. There is one other matter I must ask him about.

Q: Has any threat been made against you in regard to your revealing the information about what you saw on the morning of February 17th, and anything else about the activities and whereabouts of the young woman you've described, the girl and the hat?

A: Well, the night before last when I had a conversation outside the Village Shop, you know, I told her I wasn't living there any more, you know. She asked me why and I said my wife was upset because of what was going on, the hippies and everything, and she asked me, she said "Where do you live now?" and she point blank asked me my address. She wanted to know where my address was, so I told her. I didn't tell her my real address, I told her a phoney one, but then I started to leave. My wife, you know, went by in the car, so I walked up to my mother-in-law's to meet my wife, and as I started to walk away real fast she was talking to her boy friend, and she said "Where are you going?" I said "I gotta go now. My wife just passed by." And she said "What was your address?" and she asked me two times what my address was, and so, you know, I told her again the same address I told her before, and she said, you know, kind of jokingly, she said "Well, tell your wife to lock the doors, because we'll be over to see you."

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ARTICLE 32 TESTIMONY OF INVESTIGATOR WILLIAM F. IVORY

[1512] Q: Mr. Ivroy [sic], why were no notes taken of the interview with Miss Stokley?

A: I did have a notebook with me, and I started to take notes and she got very nervous and shied away, and I put my pen and notebook away.

Q: Did you make any notes at all in your notebook?

A: I just started—I believe I wrote her name down at the top of the page.

Q: And what did she do or say to indicate that she was objecting to your making notes of what she was saying?

A: She said something to the effect of what are you doing? What are you writing?

Q: And what did you say?

A: I said "Nothing, I'm not writing anything" and I just put it down.

Q: Did you ask her whether she objected to your making notes of the interview?

A: No, I did not.

Q: Why not?

A: I was concerned with getting over with the interview, rather than making her so nervous that she would not answer me at all.

Q: What was so terrible about making her nervous about asking her about her whereabouts on the morning of the 17th?

[1513] A: I don't know and that's why I put the notebook away so I could find out, so I could find out what she had to say.

Q: Did you find out where she [Helena Stoeckley] was between the hours of 2 a.m. and 4 a.m. on February 17th 1970?

A: No, I did not.

Q: Did you ask her where she was?

A: I did.

Q: What, if anything, did she say?

A: She said she could not recall, she could not remember.

Q: Did she indicate any reason why she was unable to recall?

A: Yes, sir, she did.

Q: And what was the reason?

A: She said that she had been out on marihuana.

Q: On Marihuana?

A: Yes, sir.

Q: Are those her words, that she was on marihuana?

A: That's correct.

Q: Mr Ivory, you—was she telling you that she couldn't remember where she was because she'd been using marihuana?

A: That's correct.

Q: Mr. Ivory, you've had occasion to investigate cases in which cannabis sativa has been used, haven't you?

A: Yes, I have.

Q: Do you know to your knowledge, is that a medically recognized result of smoking marihuana, to lose memory?

A: Not to my knowledge?

Q: Not to your knowledge. Were you told by anyone that Mr Posey had previously said that Miss Stokely said that she had been taking, at one time she said LSD and another time she said mescaline? No one ever told you that?

A: Would you go over that again, please?

Q: Had anyone ever told you that Mr. [*sic*] Stokley was reported to have said on one occasion she was using mescaline that night and on another [1514] occasion she reported to have said LSD that night?

A: She told me in that interview she was taking marihuana.

Q: Well, I want to know, were you armed with the information—

A: No, I was not.

Q: Now did you ask Miss Stokely why she was able to recall where she was since marihuana is not known to have the effect of impairing ones memory?

A: Yes, I did.

Q: And she said what?

A: She said she didn't know, she just couldn't remember.

Q: Now what color is Miss Stokely's hair?

A: Red.

Q: Would you say it is a dark red?

A: Yes.

Q: Did you ask her about a blond wig?

A: Yes, I did.

Q: And did she admit to having owned a blond wig up until about February 17?

A: I asked her specifically about the blond wig, and she said that she had worn one occasionally, but it was not her's, that it belonged to a girl friend and she did not have it.

Q: And did she say when she returned or disposed of that blond wig?

A: No, she did not.

Q: Did anybody ask her whether it had been shortly after February 17th, 1970?

A: It was subsequent to that date, but the exact date she couldn't recall.

Q: And did she give you the name of the girl?

A: No, she did not.

Q: Did you ask for that name?

A: Yes, I did.

Q: Did she refuse to give you that name?

A: No, she said she just couldn't recall which of the girls it belonged to.

Q: Did she tell you where it was that she had effected the return of the wig, the street or apartment, where the other girls lived?

A: No, she did not.

[1515] Q: Did you ask her where it was?

A: No, I did not.

Q: Did you ask her whether she had ever owned a large floppy hat?

A: Yes, I did.

Q: What, if anything, did she say about that?

A: She said yes she did.

Q: Did she indicate where that hat is now?

A: She indicated she gave it to someone, but she could not recall the name of the person she gave it to.

Q: And did she indicate where that episode in giving the hat away took place shortly after February 17th 1970?

A: She did not indicate the day, nor did I ask.

Q: Was there any reason why you didn't ask her when she stopped wearing or got rid of the hat?

A: No particular reason.

Q: Did you ask her whether she owned boots of any sort?

A: Yes, I did.

Q: And what did she say?

A: She said, yes, she did.

Q: And does she still own or wear leather boots?

A: Yes, she does.

Q: Did she have them on the day you saw her?

A: No, she did not.

Q: Did she describe to you what color they were?

A: She—the color she had around that period were black.

Q: What do you mean "around that period?" Did she indicate that she owned more than one pair of boots?

A: Yes.

Q: Did she ever indicate to you she owned brown boots?

A: No.

Q: What colors did she indicate she owned?

A: Black.

[1516] Q: Just black?

A: Black.

Q: Were they—do you know anything about the type of boots they were? Were they large boots, large open-ings at the top, or were they boots that have to be zipped up because they were tight to the leg?

A: I do not know what type. She indicated they came to about this position on her leg, which will be maybe two or so inches below the knee.

Q: Did she indicate to you that she had given away or disposed of any pair of boots about the middle of February 1970?

A: Yes, she did.

Q: What did she say in that regard?

A: She said she threw them away?

Q: And did she know where she threw them away?

A: Yes, she threw—she indicated that the heel was worn or was broken from her boot, and since she had another pair of boots, she discarded them in a trash can.

Q: Now, did you ask Miss Stokely whether she would be willing to come here to this inquiry and tell us what she knew about her whereabouts of February 17th, 1970?

A: Yes, I did.

Q: And what, if anything, did she say?

A: She said no, she would not.

Q: Did you ask her why she would not come?

A: She indicated she didn't want to become involved.

COL ROCK: I'm sorry. She didn't want what?

WIT: Become involved.

Q: May I ask how she came to be in the office of the Chief of Detectives of Fayetteville police?

A: I had asked the detectives to be on the look out for her and if they got her to call me so I could talk to her.

Q: She was picked up by the Fayetteville police?

A: Let's not say "picked up." She was asked to come in to talk to us.

[1517] Q: Well, is there any reason why you couldn't ask her the same way the Fayetteville police did?

A: I did not know where she was living.

Q: Once she has arrived at the police headquarters at a request, was there any reason why you couldn't make the same type request that she appear at these proceedings?

A: I asked her would she be willing to go to court, or I did not specifically say article 32 but court, and she said no, she would not.

Q: Did you talk to her about her interest in witchcraft?

A: No. The subject came up, yes.

Q: In what fashion did it come up?

A: I asked her what type of dress she usually wore. She said sometimes purple, sometimes black.

Q: What color of clothing was she wearing when you saw her?

A: Purple.

Q: Was she wearing a skirt or dress?

A: She was wearing a pants suit.

Q: Pants?

A: Suit.

Q: Pants suit?

A: Yes.

Q: What kind of footgear did she have on?

A: Shoes.

Q: What?

A: Shoes.

Q: Where does she live today?

A: I have no idea where she is now.

Q: All right, may I ask the date that you saw her in the Fayetteville Police Department, what was her address on that date?

A: She gave me an address on Arsenal Avenue.

Q: And what was that address, please?

A: 909.

[1518] Q: 909 Arsenal Avenue? Have you ever verified that address as to whether in fact she resided there?

A: I've been to the house but I've never found her at the house.

Q: You mean subsequent to the day you talked to her in the police station, you've been there. Is that right?

A: That's right.

Q: How long after that date did you go to her house to see whether she was there?

A: Oh, it was weeks, a few weeks.

Q: Well, you only talked to her about two weeks ago, I think.

A: Right, I believe I corrected myself later and said that I believe it might have been earlier, which is a few weeks.

Q: All right, let me ask you this. Did the interview of Miss Stokely take place before or after the last time these Article 32 proceedings convened, which was the second week of August?

A: It would have been subsequent to that.

Q: Subsequent. Did you ascertain whether she lived at the address at Arsenal Street that she gave you?

A: No, I did not. That is the address that she gives around town as being her address.

Q: Well, did you talk to anybody at that address?

A: I talked to a woman at that address.

Q: And did she say that Miss Stokely lived there?

A: She was being very cagey with me and would not answer. She answered, but—

Q: What did the woman say when you said "Is Helene Stokely living here?"

A: She said "No, I don't know anyone by that name."

Q: In other words, she denied knowing Helene Stokely?

A: Yes, at that time.

Q: Did you ask her whether she knew anybody by the name of Helen or anybody?

A: No.

Q: Did you show her the polaroid photograph that you have here and said is that the lady that lives in the house perhaps by some other name?

A: I did not have in my possession the picture at that time.

[1519] Q: Have you ever gone back subsequent with the photograph and showed it to the lady to see whether Helene Stokely lives at 909 Arsenal Street?

A: No, I haven't.

Q: Do you know where the Fayetteville police picked her up on the day that you interviewed her?

A: No, I do not.

Q: You have no idea how they found her?

A: No idea in the world.

Q: Do you know whether Helene Stokely has been fingerprinted by the Fayetteville police?

A: By the Fayetteville police, I'm sure she has.

Q: Well, why are you sure that she has been fingerprinted?

A: Because she was arrested.

Q: Do you know when she was arrested?

A: Yes, around the end of this month.

Q: The end of the month of—

A: Last month.

Q: July or August? The end of August?

A: Correct.

Q: What was she charged with?

A: Trespassing.

Q: Is it normal to fingerprint people here in Fayetteville when they are charged with trespassing?

A: When anyone is put in jail, to my knowledge, sir, they are fingerprinted.

Q: Do you have specific knowledge of whether Fayetteville police—

A: If they followed their usual procedures, yes.

Q: Do you know whether there is a set of prints of Helene Stokely in the Fayetteville police files prior to August of 1970?

A: I do not know.

Q: Do you know whether she was arrested prior to August 1970 at any time?

A: I know she was arrested but I don't know whether she was placed in jail or not.

[1520] Q: Well, where was she arrested prior to August 1970?

A: I don't know. I don't know any of the details of that.

Q: Did you ask to see whether you could get a set of her fingerprints prior to August 1970?

A: No, I did not.

Q: Was there any reason why you didn't ask for fingerprints?

A: No reason, sir. I had already obtained a set of fingerprints.

Q: When did you obtain a set of her fingerprints?

A: They were obtained on 19 February by the Federal Bureau.

Q: A set of her fingerprints?

A: Yes, however under an alias.

Q: What was the alias?

A: I don't know.

Q: You say you do not know the alias under which she was previously arrested. Can you find that out for us, sir?

A: She was using several alias.

Q: What alias does she use?

A: Margie Raynor.

Q: Raynor?

A: Yes, sir.

Q: What else, sir?

A: Margie Foster.

Q: Do you know any others?

A: Those are the only full names that I know.

Q: Do you know how old this young lady is?

A: I believe she's around eighteen years.

Q: Did you discuss with her whether she used LSD?

A: No, I did not.

Q: Did you discuss with her whether she regularly used any form of drugs?

A: Let me correct myself. Yes,.I did.

Q: What, if anything, did she say in regard to her use of drugs?

[1521] A: She said she had tried marihuana and I believe she had tried LSD.

Q: When you say tried, did she tell you that she used LSD on a hundred or more occasions?

A: No, she did not.

Q: Did she indicate to you on how many occasions she used LSD?

A: No, she did not.

Q: Did she give you the names of the other young ladies with whom she lived in the building next door to where Mr Posey lived?

A: No, she did not. She gave me—

Q: Excuse me.

A: She gave me the first name of Marie.

Q: As one of the girls with whom she lived?

A: Yes.

Q: And what about the second girl with whom she lived? Did she give you any other name?

A: She said she did not remember the girl's name.

Q: Did you ask Miss Stokely what her relationship is with the person by the name of Paul Bowman?

A: Paul Bowman? The name is familiar but I—I can't relate it to that conversation.

Q: I believe that Paul Bowman would be known to Fayetteville police as a person who is suspected as dealing in narcotics. Perhaps his name is known to you in that connection too. Did you ask Miss Stokely anything about her—who her associates were, male associates?

A: Yes, I did.

Q: Were the answers as vague as all the other answers, by first names?

A: First names, yes, sir.

Q: Did she tell you what is the last thing she can remember doing prior to 4 a.m. on February 17th?

A: Yes, leaving the house she was living in alone, and driving in the car, just driving aimlessly, she said.

Q: Did she have any idea about what time it was she left the house?

A: Sometime—midnight or after.

[1522] Q: Did she indicate how she fixed the time when she left the house?

A: No, just knew in her mind that it was midnight or after.

Q: You mean she knew in her mind or that's all she chose to tell?

A: Well, that's what she told me.

Q: Did you ask her for the description of the owner of that blue Mustang she was driving?

A: Yes, I did.

Q: And what, if anything, did she tell you in that regard?

A: He was a white male, former enlisted man in the Army, and she couldn't go into more specific details, other than the physical description.

Q: Did you ask her any questions about specific identification points?

A: I asked her to describe the man to me as best she could, and she said he was twenty or under and a white male, dark hair.

Q: Did you ask her any other questions in regard to the identification of that person, or the description of that person?

A: That's all she could furnish me, in any way of a description.

Q: But did you ask her any specific points of identification?

A: Yes, sir, I asked her to describe any facial features, etcetera.

Q: Is that fair to say that's the only type of question you put to her?

A: Yes, she just could give me a general description.

Q: When you say she could just give you, you mean she could or that's all she chose to give you?

A: I couldn't read her mind. That's what she gave me.

Q: How about her manner of demeanor? Did she strike you as being frank, candid and open?

A: Yes, she struck me as being frank.

Q: Candid and open. Is that right?

A: Right.

Q: And you thought a person who did not know the names of the persons she lived with as being frank, candid and open?

A: Yes.

Q: And you thought that her inability to tell you the last name of the owner of the automobile that she used for the evening was also frank, candid and open?

[1523] A: Yes.

Q: And you thought that her telling you that she could not remember where she was for approximately four hours, because she was smoking marihuana is a frank, candid and open answer?

A: That's the answer she gave me, and I couldn't get anything else.

Q: Well, I appreciate your difficulty in the interview, Mr Ivory. I don't underestimate that for a moment. What I am asking you is did you honestly take that as a frank, candid and open answer that she said because of marihuana she was not able to remember her whereabouts?

A: I could not—I could only take it as face value as what she gave me.

Q: Well, the face value of that statement is a lie, since you know that marihuana doesn't have that effect on persons.

A: I've never tried it. I do not know.

Q: Well, I didn't again suggest that. I said based upon your experience as an investigator, I am sure you've talked with physicians in regard to marihauna, the fact you are aware, I am sure, that marihuana does not—is not reported in any way to effect the memory processes.

A: As far as I know.

Q: So knowing that, at least, you still felt that she was being frank, candid and open when she told you that she couldn't remember her whereabouts when she was smoking marihuana?

A: What else could I say?

Q: You could say that she was a liar and ask her to be more specific about what she was doing and where she was.

A: I possibly could have.

Q: But you did not, sir?

A: No, I did not.

Q: Did you ask Miss Stokely about her relationship with Mr. Posey?

A: Yes, I did.

Q: And did she indicate that Mr Posey had any grudge or malice against her that she knew of?

A: She couldn't understand why that he had, had—she couldn't understand really why he had any—she said that on occasion she had teased him [1524] about being a square but that was the extent of her relationship with him.

Q: Did Miss Stokely admit or deny having a had a conversation with Mr Posey on the street in August 1970, earlier last month, in the Haymount Section of town?

A: No, I didn't query her about that.

Q: Were you aware that Mr Posey had testified in these proceedings that he had seen Miss Stokely, if that's the right person, that he talked to, on or about August the 12th of 1970?

A: No, I didn't know that.

Q: Were you told by anybody that Posey had said that he had seen Miss Stokely during the month of August?

A: No.

Q: As far as you know, when was the last time Mr Posey is supposed to have been in the presence of Miss Stokely?

A: On dates she was—if not vague, she just didn't know dates.

Q: Well, did you ask her when was the last time she saw Posey?

A: No, I did not.

Q: Was there any reason why you didn't ask her that?

A: No, no particular reason.

Q: You have no more information than you can give as to when she believes was the last time she was in Mr Posey's company?

A: No.

Q: Did she indicate when she moved from the apartment next door to where Mr Posey lived?

A: No, she did not.

Q: Did you ask her when?

A: No.

Q: Were you aware that Mr Posey had said that she moved within a short period, maybe a matter of days or week, after the MacDonald episode, on February 17th?

A: No, I was not aware of this.

[1525] Q: And you did not ask her whether, you know, when she moved to the address at Arsenal Street?

A: No, I did not.

Q: Would you tell me, what was the purpose of your interviewing Miss Stokely?

A: To find out if, in fact, she was involved, or if there was any implication of her being involved in anything at Fort Bragg.

Q: You mean—anything at Fort Bragg—I assume you are talking about the MacDonald killings?

A: Correct.

Q: So you went there for the purpose of interrogating her as a possible suspect. Is that right?

A: correct.

Q: How long did this interview take place?

A: Oh, we were in there for about an hour, I'd say.

Q: And how did your interview end?

A: It ended wtih that photograph being taken.

Q: With that particular photograph being taken?

A: correct.

Q: In other words, that photograph is marked with what identification?

A: G-105.

Q: So that's a photograph that was in existence at the time we had our last hearings here from August 9th through 14th of 1970?

A: Not recalling the date, I don't know if they were in session or not.

Q: Well, I will suggest to you that the record will show that that photograph was marked into evidence during the week of August the 9th through 14th of 1970, and that therefore you must have seen her, except your description of how these things took place, prior to Monday, August the 10th, 1970. Is that right, sir? Would that be approximately right?

A: It had to have been—it was—if I could recall the date, I could say yes or no. I don't recall the date I talked to her, but evidently it was before the picture was put in evidence.

Q: Now you specifically asked the assistance of Fayetteville police to find this young lady for the purpose of questioning. Is that right?

[1526] A: That's correct.

Q: Now you told us the only reason you wanted to question her was to see what her connection was with the MacDonald case. Is that right?

A: Correct.

Q: What made her a suspect in your mind as a potential connection with the MacDonald case?

A: It came to my attention that she was the one that Mr Posey had testified about.

Q: Well, if the photograph was introduced here in evidence during the week of the 9th through the 14th, Mr Posey didn't testify until about the 13th of August, how could you have known about her prior to the 13th of August?

A: I'll have to take your word for these dates, counselor, because I just don't know.

Q: I think we have the transcript of the case available. You mean on the basis of Mr Posey's testimony that made this young lady a suspect. Is that right? What is it that made her a suspect? Mr Posey's testimony?

A: Correct.

Q: Now what you have done to check out the various explanations of stories this young lady gave you?

A: Well, it was so vague it was really not much background to be done on it.

Q: Did you make any attempt to find the Blue Mustang she talked about?

A: Taking again her testimony, she said the man is now out of the Army and left the area.

Q: That was just her word.

A: Well, there are many blue Mustangs in that area.

Q: But, now, you know, Mr Ivory, I really find it very difficult to accept the idea that you just listened to this lady's statements point blank and said, well that's it, and wrote her off as a suspect in this case. Is that what you did?

CPT SOMERS: I object. Now the counsel is admonishing the witness and verging on badgering the witness. If he wishes to ask questions let him ask [1527] questions, but to lecture the witness, I object to that.

MR SEGAL: Let me say this, sir. Captain Somers is perfectly right, except that it really—it really asks a great deal, and I would like to cut the red tape and if Mr Ivory can just explain to me whether it is just standard to take a series of, you know, very vague explanations and say, oh, well, that's the end of it. We won't be able to check this person out in a triple murder case, or whether there is some other reason. It just begets all sensibility to think this is the way investigations are handled. They are not handled that way. In my career, sir, I have been involved in over 500 murder cases. I've represented 7,000 defendants in 13 years and I have never heard of a true suspect being handled this way. Now, there may be good reasons to disregard this young lady. I think Mr Ivory ought to be allowed to tell us now really why anything substantial hasn't been done to check out Helene Stokely and her explanations, which on their face, particularly this explanation about the marihuana is palpably unacceptable, and I think that the question is put for that purpose. If it is really that offensive to everyone I will go about it in a different way.

CPT BEALE: Mr Segal, the form of your question was argumentative and I think it would be best if you would just stick to the normal procedure on cross examination of asking the witness questions.

Q: Now you say this young lady was arrested for trespassing. Is that right?

A: Correct.

Q: Do you have—did the Fayetteville police take an official police photograph in connection with that arrest?

A: I don't know.

Q: Is it the standard practice to do that?

A: I—I imagine so. Their ID bureau has both fingerprints and photos.

Q: Now where was it that she was trespassing?

A: At the Village Inn or Village Shop in Haymount Section of Fayetteville.

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UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NORTH CAROLINA FAYETTEVILLE DIVISION

Criminal No. 75-26-CR-3

UNITED STATES OF AMERICA, PLAINTIFF

vs.

JEFFREY R. MACDONALD, DEFENDANT

MOTION TO DISMISS INDICTMENT FOR DENIAL OF RIGHT TO SPEEDY PROSECUTION AND TRIAL

The defendant, JEFFREY R. MacDONALD, respectfully moves this Court, pursuant to the Constitution and laws of the United States and to Federal Rule of Criminal Procedure 48, to dismiss the indictment against him because of the denial of his right to speedy prosecution and trial. In support of the said motion the defendant alleges as follows:

1. In February, 1970, the defendant, a medical doctor, was serving in the United States Army, attached to the Sixth Special Forces Group, at Ft. Bragg, North Carolina.

2. On February 17, 1970, the defendant's wife, COLETTE, and his two daughters, KRISTEN, age 3, and KIMBERLEY, age 6, were murdered, and the defendant stabbed and wounded by a group of intruders in the defendant's home, located on Ft. Bragg, North Carolina.

3. After the Army investigation failed to locate the perpetrators of the said crime, the Army, in April, 1970, caused the defendant to be arrested and charged with the murder of his family.

4. Pursuant to the Uniform Code of Military Justice (UCMJ) the charges against the defendant were submitted to an officer appointed pursuant to Article 32 of the UCMJ. The said officer conducted judicial proceedings

from June through September, 1970, including four full weeks of testimony in Court.

At all times throughout the said proceedings the Government was represented by counsel. The defendant was present at all times throughout these proceedings and was represented by counsel.

5. The Government presented all of the evidence known to it and which had been assembled as a result of the efforts of more than one hundred military and civilian law enforcement investigators. The said investigators had assembled evidence from several thousand witnesses in various countries throughout the world.

6. All physical evidence that had been obtained by the Government was subjected to intensive examination at the criminal investigation laboratories of the Provost Marshal General of the United States Army, located at Ft. Gordon, Georgia. The said evidence was also examined by other experts retained by the Government.

7. The Government called twenty-seven (27) witnesses in its case-in-chief against the defendant and in rebuttal to defense testimony.

8. The defendant offered a full defense to the charges against him at the said procedings. He testified at length under oath and was subjected to a full and searching cross-examination by counsel for the Government. The defendant was also examined extensively by the Court itself.

9. The defendant called twenty-nine (29) witnesses on his behalf.

10. The Government was required by the Court to present all the evidence known to it in support of the charges against the defendant, and it did so.

11. In September, 1970, following the conclusion of these proceedings the Court made only two findings:

(a) The charges against the defendant were false.

(b) That the Government should pursue the investigation of another named individual as a suspect in the murders of the MacDonald family and the assault on the defendant.

12. The conclusions of the presiding officer at the Article 32 proceedings were submitted to Major General Edward Flanagan, Commanding General of the John F. Kennedy Center for Special Warfare and U.S. Army Special Forces. The said conclusions were subjected to a full, independent judicial review by General FLANAGAN.

13. In October 1970 General FLANAGAN entered an order dismissing finally and with prejudice the charges against the defendant brought by the Government.

14. The order of General FLANAGAN dismissing with prejudice the charges against the defendant was subjected to an additional independent judicial review by Lt. General JOHN J. TOLSON, Commanding General of the XVIII Airborne Corps, Fort Bragg, North Carolina. Following the review by General TOLSON, he concurred in the adjudication by General FLANAGAN and affirmed the dismissal of the charges against the defendant.

15. On December 5, 1970, the defendant was Honorably Discharged from the Army.

16. From January, 1971, to January, 1972, the Criminal Investigation Division (CID) of the United States Army conducted what it contends was a complete, extensive and thorough reinvestigation of the murders of the MacDonald family.

17. In early 1972, the CID requested the United States Attorney for the Eastern District of North Carolina to seek an indictment of the defendant for the murders of his family.

18. The said United States Attorney failed, refused and neglected to seek an indictment in the said matter and took no substantive action on the requests for the indictment.

19. The defendant is advised, believes and therefore avers that in early 1972 the CID requested the Department of Justice to direct that an indictment be sought against the defendant in the Eastern District of North Carolina.

20. From early 1972 until July, 1974, the Department of Justice failed, refused and neglected to act on the request of the Army to seek an indictment of the defendant. During the said period the Department of Justice took no substantive action on the request to proceed against the defendant. Further, no legally valid reasons existed for the delay in instituting any action against the defendant, except that there was no evidence to support such an accusation.

21. From early 1972 until July, 1974, the Department of Justice received requests from the defendant and from other persons that a final decision be made in regard to proceeding with the accusations against the defendant, including a speedy trial if he was to be accused.

22. On January 10, 1974, CARL W. BELCHER, Chief of the General Crimes Section, Criminal Division, Department of Justice, stated in writing that:

> ". . . the evidence currently available in this case is insufficient to warrant prosecution against Dr. MacDonald at this time."

23. From January 10, 1974, the date of BELCHER's statement, until August 12, 1974, when the Grand Jury was empaneled which subsequently indicted the defendant, the Government obtained no additional new evidence against the defendant.

24. Despite the conclusion of Government Attorney BELCHER on January 10, 1974, the Department of Justice in July of 1974 instituted proceedings to have the accusation against the defendant submitted to the Grand Jury for the Eastern District of North Carolina which was to be empaneled August 12, 1974.

25. The decision of the Department of Justice on July, 1974, to submit the accusations against the defendant and seek an indictment of him before the Grand Jury was made as the result of pressures on the Department of Justice from outside sources and not because any new evidence had become available to the Government.

26. The conduct of the proceedings before the Grand Jury from August 12, 1974, through January 24, 1975 were needlessly and negligently delayed by the Government in total and complete disregard of the defendant's right to a speedy disposition of the charges against him and of his right to a speedy trial.

27. The Government, by its own admission, obtained no new evidence against the defendant from September, 1970, until the commencement of the Grand Jury proceedings on August 12, 1974.

The Government, by its own admission, presented no new evidence to the Grand Jury.

The Government, by its own admission, has conceded that the only difference between the initial proceedings against the defendant in 1970 and the proceedings before the Grand Jury was that the physical evidence collected by the Government in 1970 was "reinterpreted" by Government technicians.

28. The physical evidence referred to above was available to the Government at all times from February 17, 1970 through January 24, 1975.

The technicians who reinterpreted the physical evidence were available to the Government at all times since February 17, 1970.

29. The failure, refusal and neglect of the Government to submit the said physical evidence for such interpretation from 1970 to 1975 was the result of negligence, incompetence and indifference on the part of the Government to the constitutional rights of the defendant.

30. The evidence that was used by the Government to obtain the present indictment, and that will be used against the defendant at this trial, together with the witnesses who will be called by the Government have been known and available to the Government at all times in the years 1970, 1971, 1972, 1973, 1974, and 1975.

31. The United States Army and its Criminal investigation Division have been in charge or actively connected with the investigation of the murders of the MACDONALD family from February 17, 1970, through the indictment of the defendant on January 23, 1975, to the present time.

32. The Federal Bureau of Investigation was actively participating in and connected with the investigation of the murders of the MACDONALD family in February and March of 1970, and throughout the Grand Jury proceedings in this case. The FBI was available at all times from March, 1970 until July, 1974, to assist in the said investigation if it had been requested to do so by the United States Army, the Criminal Investigation Division of the Army or the Department of Justice.

33. The failure of the Government to act to bring the defendant to trial until more than five years have elapsed since the criminal proceedings were initiated against him in April, 1970, under the circumstances set out herein, constitute a denial of the rights of the defendant to a speedy trial, as guaranteed by the Sixth Amendment, and to due process of law, under the Fifth Amendment to the Constitution of the United States.

34. No other relief than the dismissal of the indictment can vindicate the defendant's rights to a speedy trial, and to due process of law, which rights attached when the criminal proceedings in this matter were initiated against the defendant in April, 1970.

WHEREFORE, the defendant prays that Honorable Court order the above-captioned indictment against the defendant be dismissed.

Dated: April 5, 1975

/s/ Bernard L. Segal
BERNARD L. SEGAL

Suite 220, 536 Mission Street
San Francisco, California 94105

/s/ Durant Williams Escott
DURANT WILLIAMS ESCOTT
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IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NORTH CAROLINA

Criminal No. 75-26-CR-3

UNITED STATES OF AMERICA, PLAINTIFF

v.

JEFFREY R. MACDONALD, DEFENDANT

MOTION TO DISMISS INDICTMENT BECAUSE OF DENIAL OF DEFENDANT'S RIGHT TO A SPEEDY TRIAL

TO THE HONORABLE FRANKLIN T. DUPREE, JR., JUDGE OF SAID COURT:

The Defendant, JEFFREY R. MacDONALD, by his attorneys, moves the Court for an order dismissing the indictment against him in the above-captioned matter, on the grounds that the indictment and trial herein are barred because of the Government's intentional and impermissible denial of Defendant's speedy trial right under the Sixth Amendment to the United States Constitution. *United States* v. *MacDonald*, 531 F.2d 196 (4th Cir. 1976) (law of this case), *rev'd on other grounds*, 435 U.S. 850 (1978).

In addition to all the reasons set forth in the cited opinion, which should itself be dispositive of this case, the Court should now consider the fact that, at oral argument before the Supreme Court, counsel for the Government represented to the Supreme Court that the Government had intentionally delayed bringing this matter before the grand jury for the reason that within the Department of Justice there was a serious split of opinion as to whether the Government could obtain a conviction, and that this split of opinion took several years to resolve. Thus, the only purpose for the delay which the

Government has admitted to, was to obtain a tactical advantage over the Defendant.
Dated: July 13, 1979

Respectfully submitted,

By /s/ Bernard L. Segal
BERNARD L. SEGAL, Esquire
Post Office Box 1151
Raleigh, North Carolina 27602
Attorney for Defendant
Jeffrey R. MacDonald

and with him

By /s/ Wade M. Smith
WADE M. SMITH, Esquire
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RELEVANT PORTIONS OF TRIAL TRANSCRIPT TESTIMONY OF HELENA STOECKLEY

* * * * *

[5548] Q Now, I want to direct your attention to February of 1970, Ms. Stoeckley. I want to ask you about the early morning hours of February 17th of 1970; all right?

A Yes, sir.

Q Well, just to give us a little context—let me back it up. Late on the evening of February 16, 1970, what were you doing if you recall?

A In the evening, I don't know.

Q What is the last thing you remember doing on February 16, 1970—that's Monday—Monday evening?

A The last thing I remember doing is talking to a friend of mine in my driveway.

Q And who would that person have been? Do you remember the first name?

A Greg.

Q About what time of the day or night was it when you spoke to him?

A It was around midnight.

Q That means it would be February 16th if it was 11:59 p.m. and if it was midnight, it was February 17th?

MR. MURTAGH: OBJECTION, Your Honor.

MR. SEGAL: Can we not get the times straight in this case, Your Honor, without an objection [5549] from the Government? I can't understand why that should be a subject of any objection to anybody in this court that would want to know.

THE COURT: Is it all right if they object, and the objection is OVERRULED?

MR. SEGAL: It is not that question, Your Honor—

THE COURT: (Interposing) It is that question. Now, you ask your next one.

MR. SEGAL: Thank you. May I have Your Honor's indulgence for one second?

(Pause.)

* * * * *

[5551] THE COURT: Any further questions of this witness?

MR. SEGAL: Yes, Your Honor.

THE COURT: Go ahead.

BY MR. SEGAL:

Q Now, you say you recall standing in your driveway about midnight either at the end of February 16th or the beginning of February 17th; is that right—1970?

A Yes, sir.

Q Where did you live? What was your address at that time?

A I'm not sure of the number, but it was on Clark Street.

Q Did you have a neighbor by the name of Bill Posey—William Posey—at that time?

A Yes, sir.

Q And did you know Mr. Posey—who he was?

A Yes, sir.

Q Was this a whole house or an apartment that you were living in?

A It was a house made into several different apartments.

[5552] Q Was there anything that was—well, what you would call—unusual going on that night inside the apartment?

A Not inside my apartment; no, sir.

Q All right, inside the house? Was there any painting going on at that time?

A Not at that time.

Q At some later time?

A Yes, sir.

Q When was that?

A When I returned to the house.

Q When you returned—I see. Now, how long did this conversation that you were having with this man in your driveway take place?

A I don't know how long it took, but I know when he left.

Q When did he leave?

A At exactly midnight. He had to get back to Fort Bragg for guard duty or something.

Q Do you know who that man was with at that time?

A He was with the 82nd Airborne Division.

Q And was he in uniform or out of uniform at that time?

A He was out of uniform.

[5553] Q Now, I ask you: after he left, what did you do?

A I'm not sure what I did after he left. I went back in the house and I don't remember what I did.

Q Had you had any drugs during the day of February 16, 1970?

A Yes, sir.

Q Would you tell us, to the best of your recollection, Ms. Stoeckley, what you had taken—what type of drugs you had taken that day?

A Well, I had taken for sure the opium and the heroin. I had smoked grass all day, and then, when Greg left, he left me with a hit of mescaline which I swallowed there at the car before he backed out.

Q Right before he left you say you received some mescaline or took some mescaline?

A Yes, sir.

Q Again, your voice is quiet and soft so it is a little hard for me to hear the details. I did not hear how you got that. Was it from him?

A He gave it to me and I swallowed it while he was still standing there.

[5554] BY MR. SEGAL:

Q What form did you take that mescaline in?

A Tablet.

Q Do you remember how many you took?

A One.

Q How soon thereafter did you start feeling any of the effects of the mescaline?

A It was good mescaline; I guess pretty soon afterwards. I am not sure about the time.

Q Is it hard to judge time when you are using a drug like that?

A Not usually.

Q Just so that I don't misunderstand you, were you using a quantity of heroin and opium on that day—February 16th—that you previously described this morning—about six or seven intravenous injections?

A Yes, sir.

Q Besides that, and the mescaline and the marihuana, do you have any recollection of any other drugs you used that day?

A No, sir.

Q Do you have any recollection—what is your next recollection after taking mescaline?

A Returning to the house later that morning.

Q Can you pinpoint in any way what time it [5555] was that you came back to the house?

A About 4:30 or 5:00 o'clock.

Q In the morning?

A Yes, sir.

Q How did you—when you say you came back—I guess it is fair to assume you were awake. How did you come back. What form of transportation did you use?

A In a car.

Q You have a recollection of coming back to that address around 4:30 or 5:00 in the morning?

A Yes, sir.

Q Were you a passenger in the car or were you driving the car?

A I was a passenger.

Q Do you offhand know what kind of car it was?

A Not what kind—it was a blue car. That's all I know.

Q It was a blue car. The make or model you have no knowledge of?

A It was a smaller-type car. I don't know what kind.

Q Do you know whether or not it was a Mustang, Ford Mustang?

[5556] MR. BLACKBURN: OBJECTION, Your Honor.

THE WITNESS: Not for sure, no, sir.

THE COURT: OVERRULED.

BY MR. SEGAL:

Q Who else was in the car, Ms. Stoeckley, when this recollection comes back to you?

A I can't remember their names. Just some soldiers from Fort Bragg.

Q How many were there?

A Two or three—I don't know.

Q Do you know what race these other men were?

A Not for sure, no.

Q When you say "not for sure," that means you would be guessing if you were to try to identify the race of each and every one of the three men in that car?

A Yes, sir.

Q Is there any explanation you can give us as to why you can recall coming back—or how you are able to recall coming back in the car, but cannot recall who the persons were who were in the car with you?

A 'Cause they just dropped me off and I got out and went in the house.

Q Do you have a specific recollection of where you were between midnight or shortly after midnight and 4:35 in the morning?

[5557] A No, sir.

Q Do you have a specific recollection as to what you did at that time, between midnight and a little bit after 4:35 in the morning?

A No, sir.

Q Do you remember in the months after February 17th, the first few days after February 17th, having some conversation with your neighbor, Bill Posey?

A Yes, sir.

Q Do you recall talking with him about the subject of the MacDonald murders at Fort Bragg?

A The subject came up but I don't remember what was said.

Q Let me break the question, if I can, into two parts. Do you or don't you recall at least talking about the MacDonald murders with Bill Posey within the week after February 17th, 1970?

A Yes, sir.

Q Do you have a recollection of anything that you said to him at that time about the MacDonald family and murders that had taken place?

A Only one conversation that I do remember having.

Q Okay, can you tell us about that [5558] conversation? First of all, do you remember approximately when after February 17th, 1970, that that conversation took place?

A It was about a week and a half later I would say. He was up on Haymont Hill, and I ran into him up there; and I was just fooling around. I knew—you know, he seemed to be trying to put me on the spot or something.

So, I don't remember the extent of the conversation, but it ended up by my telling him to tell his wife to keep her door locked.

Q May I ask, do you recall talking about the MacDonald murders before this remark was made?

MR. BLACKBURN: Your Honor, we would OBJECT.

THE COURT: SUSTAINED.

BY MR. SEGAL:

Q What was the subject matter that you were talking about before you made this comment to Mr. Posey?

A I'm not sure.

Q Did you have some other conversation with Bill Posey between February of 1970 and say August of 1970?

A Several times.

Q Did the subject of the MacDonald murders [5559] come up in those conversations?

A Usually.

MR. BLACKBURN: I would OBJECT to this line of questioning.

THE COURT: Well, I cannot rule on an objection to a line of questioning. If there is a question I will try to rule on that.

MR. SEGAL: I'm sorry; I could not hear Your Honor's ruling.

MR. BLACKBURN: I WITHDRAW the objection.

THE COURT: That one is over. I will tell you though, he apparently wanted to object to a line of questioning and it is a little bit difficult for the Court to make a ruling on that kind of an objection; but I said if you made a specific question and there was a specific objection to that question, I would undertake to rule on that. That is what I told him.

MR. SEGAL: Thank you. I gather the Government has withdrawn the objection?

THE COURT: They did.

BY MR. SEGAL:

Q What I was asking, Ms. Stoeckley, was, you did tell us of having some conversations with Bill Posey, other than the one you mentioned between then [5560] and August of 1970, right?

A Yes, sir.

Q I would ask you, did any of those conversations involve the subject of the MacDonald murders?

A Yes, sir.

Q Did any of those conversations involve where you were and what you had done between midnight and 5:00 a.m. on February 17th?

MR. BLACKBURN: Your Honor, we would OBJECT to leading in the questioning of the witness.

THE COURT: OVERRULED.

BY MR. SEGAL:

Q Did they involve that subject matter?

A Yes, sir.

Q Do you remember now what you said to Mr. Posey about those matters?

A Not specifically, no.

Q Do you recall anything that you told him during that period of time as to where you were between midnight and 5:00 a.m. on February 17, 1970?

MR. BLACKBURN: OBJECTION.

THE COURT: OVERRULED.

BY MR. SEGAL.

Q Do you recall what you said to him?

A I just told him I did not know where I was.

[5561] Q Did you tell him anything else that you now remember saying about where you were between midnight and 5:00 a.m.?

A No, sir.

Q Later on in 1970, you moved to Nashville, Tennessee, didn't you?

A Yes, sir.

Q Did the MacDonald murders have anything to do with your decision to move to Nashville?

A To some extent, yes.

Q What was the extent. Tell us about that, please?

A The police harrassment and things like that, and involvement of the family name. I just thought it would be best to move away.

Q And when you were in Nashville, where did you live?

A When I first moved there I lived in a dormitory. Then I moved out into an apartment.

Q Do you know what street that apartment was located on?

A Portland Avenue.

Q Portland Avenue?

A Yes, sir.

Q Did you have a neighbor when you lived on [5562] Portland Avenue by the name of Jane Zillioux? Did you know a lady by that name?

A She was Jane McCampbell, yes, sir.

Q Jane—

A (Interposing) McCampbell.

Q Jane McCampbell, but you now know her by her married name of Zillioux?

A Yes, sir.

Q Do you recall having a conversation in the latter part of 1970 with Jane McCampbell Zillioux about the MacDonald murders?

A Yes, sir.

[5563] BY MR. SEGAL:

Q Do you remember approximately when that took place?

A No; I was real sick that day when she came over to check on me. She was sort of afraid of me, anyway. She was not used to being around drug addicts and things like that. She was not sure what was wrong with me, so she was sort of in a hurry to leave.

Q Is that the latter of part of 1970, though?

A Yes, sir.

Q You say you were "sick." What were you suffering from at that time?

A Hepatitis.

Q Have you suffered from chronic hepatitis for some years?

A Nine years now; yes, sir.

Q When did you first become a victim of hepatitis?

A 1969.

Q Do you recall Mrs. Zillioux talking to you about your condition at that time—about the way you were feeling, the sickness you were having?

A Yes, sir.

Q Is that clear in your mind?

A Not real clear; no.

[5564] Q Do you recall the subject of the MacDonald murders coming up at that time when you were talking to Mrs. Zillioux?

A No; I don't.

Q Are you saying you don't recall it being talked about, or you don't recall what was said, if it was talked about?

A I don't recall what was said.

Q Again, I am going to break the question into two parts. First of all, I just want to know if you can recall the subject matter coming up? I don't ask you to say yet whether you remember what was said; all right?

A Yes, sir.

Q Do you recall, Ms. Stoeckley, that the subject of the MacDonald murders came up on that visit when Mrs. Zillioux came over to your apartment?

A Yes, sir.

Q Do you recall what you said to her at that time?

A No, sir.

Q Did you also know in Nashville in 1970 a man by the name of Red Underhill?

A Yes, sir.

Q Who is Red?

A He was a friend of Jane's and Bonnie Hudgins, [5565] another friend of mine in Nashville.

Q Would it be fair to say that you, Jane, Bonnie and Red all lived, first of all, very close together, did you not?

A We did not live close together. Bonnie had a store on the corner and Jane lived across the street from me, and Red was just a frequent visitor in the area.

Q Do you recall in late 1970 Red Underhill coming to your apartment? Do you remember such a visit by him?

A I remember him knocking on the door; yeah.

Q Do you recall talking with him at that time? I am not asking whether you recall the contents again, but I only want to ask you whether you recall talking to Red Underhill at that time?

A All I recall is when I finally answered the door to him and seeing who it was, and then I went back in and sat down.

Q Do you remember Red Underhill coming in?

(Witness nods affirmatively.)

Q Again, I have to ask you to say "yes" or "no."

A Yes, sir.

Q Do you have any recollection at all—well, first of all, do you recall the subject of the MacDonald murders coming up at that time when Red Underhill came [5566] there?

A No, sir.

Q Do you recall Red Underhill leaving your apartment, though?

A Yes, sir.

Q Am I correct in understanding that you do not have any recollection of what was said, though?

A No; because when Red came to the apartment I was sort of upset, which was one of the reasons he left.

Q I am sorry?

A That was one of the reasons he left so quick, because he wanted to go get Bonnie to see what was wrong with me.

Q He wanted to get Bonnie Hudgins to help you?

(Witness nods affirmatively.)

Q Yes?

A Yes, sir.

Q Just to finish that discussion—do you remember that during the time that Red was there and came to your apartment, the subject of the murders at Fort Bragg—do you remember that subject coming up?

MR. ANDERSON: OBJECTION.

THE COURT: SUSTAINED. She answered that.

MR. SEGAL: I thought it was not clear, [5567] Your Honor I am sorry.

BY MR. SEGAL:

Q Do you recall in 1970 and '71, while you were in Nashville—do you remember meeting a man by the name of Jim Gaddis?

A Yes, sir.

Q Who is or who was Jim Gaddis?

A He was a Metro patrolman at that time when I met him.

Q When you say "Metro," you mean Metropolitan Nashville Police Department?

A Yes, sir.

Q Was he a uniformed patrolmen, or was he on some sort of special assignment?

A He was on special assignment with Internal Affairs.

Q He was on special assignment with what?

A With Internal Affairs.

Q How long did you know Jim Gaddis?

A About a year and a half, I guess.

Q Do you recall at some time during the period when you were an acquaintance of Jim Gaddis the subject of the MacDonald murders at Fort Bragg coming up?

A Several times.

Q Several times? Do you recall what you said, [5568] the words you said about where you were and what you did on February 17, 1970, when you spoke to Jim Gaddis?

A Not specifically.

Q Did I ask you when I talked to you yesterday to try and think of the words that you said at those times you spoke to Mr. Gaddis?

MR. BLACKBURN: OBJECTION.

THE COURT: OVERRULED.

BY MR. SEGAL:

Q Did I ask you to try and think of those?

A You asked me, but I can't remember anything that was said.

Q That was the next question. Did I ask you to think about it? Have you tried?

A I have tried, but I don't remember what was said.

Q Do you recall talking to a CID Agent in 1970 and '71?

A I talked to several CID Agents.

Q Do you remember one particular CID Agent by the name of Mr. Brisentine? Does that name at all sound familiar to you?

A The name does; yes, sir.

Q Do you remember the name of any other CID Agent?

[5569] A Mahon.

Q Mr. Mahon? Is it your recollection that Mr. Mahon and Mr. Brisentine saw you at the same time?

A Yes, sir.

Q If I were to suggest to you that this was about April 24th of 1971, would you have any reason to disagree with that?

A No, sir.

Q Was that discussion about—or in that discussion, did the subject of the MacDonald murders come up when you were asked questions about that?

A That was the topic of conversation.

Q If you recall the conversation right, do you remember what you told Mr. Brisentine at that time?

A No, sir.

Q And that includes—I will go into the whole question. Do you recall what you told Mr. Brisentine, if anything, about what you may have done on the early morning hours of February 17, 1970?

A All I told the CID whenever I talked to them was I didn't know where I was at that time.

Q The conversation with Mr. Brisentine—did it last more than about 30 seconds?

A Yes, sir.

Q About how long did it last, yould you say?

[5570] A Approximately an hour, I would say.

Q Do you recall anything else that you said to Mr. Brisentine on April 24, 1971, about the MacDonald murders?

A No, sir.

Q Did you know a policeman—actually, a detective —in Fayetteville in 1969-1970, by the name of P. E. Beasley?

A Yes, sir.

Q How old a man was Mr. Beasley at that time?

A About 50 years old.

Q About 50 years old? And what was Mr. Beasley's work in the police department at Fayetteville at that time, if you know?

A He was with the Inter-Agency Bureau of Narcotics and Dangerous Drugs.

[5571] BY MR. SEGAL:

Q When you say the Inter-Agency Bureau of Narcotics and Drugs, do you know what that was? What is the Inter-Agency Bureau?

A It was made up of CID and city police and different agencies.

Q When did you first meet Mr. Beasley?

A I guess the first time he busted me.

Q That was your introduction; right?

A Yes, sir.

Q Well, when did that first contact with Beasley take place?

A Late 1969.

Q Was that an arrest for a narcotics law violation against you?

A Not the first one; no, sir. Not the first time he busted me; no, sir.

Q What was it for?

A I think it was for trespassing.

Q Did you and Mr. Beasley have other similar contacts afterwards?

A Only in narcotics.

Q Did he bust you again?

A Yes, sir.

Q Did you continue to know Mr. Beasley all [5572] the time that you remained living in Fayetteville?

A Yes, sir.

Q What was your relationship with him? Was he an enemy, a stranger to you? Just describe in your own words.

A I considered him a very good friend.

Q Was Mr. Beasley somebody you trusted?

A Yes, sir.

Q Did Mr. Beasley express some trust in you?

A Yes, sir.

Q Did you ever know Mr. Beasley ever to do anything as far as you were concerned that you couldn't depend upon or rely upon in your own experiences with him?

A Never.

Q Do you consider Mr. Beasley today, here—August 1979—to still be a friend of yours?

A Yes, sir.

Q Did you stay in contact with Mr. Beasley after you left Fayetteville?

A Yes, sir.

Q How did you do that, Ms. Stoeckley?

A Well, if I was visiting Fayetteville, I would call him at the station. One time he was in the hospital. I went to see him when he was at home.

[5573] Q Did you ever have occasion to write Mr. Beasley?

A I think I did; yes, sir.

Q You talked to him over the years; is that right?

A Well, he came to Nashville too.

Q He came to Nashville too. Do you recall when he came to Nashville?

A Sure do.

Q About when?

A About 1972. He came up there with a CID agent, Dick Mahon.

Q And at that time did the subject of the MacDonald murders come up?

A That was his reason for being there; yes, sir.

Q If I were to suggest to you that that was probably more like between February 27th of 1971, and March the 1st of 1971, would you have any reason to think otherwise as far as the dates?

A No, sir.

Q Did you not talk to Mr. Beasley on several occasions between those three dates—the 27th through the 1st of March? Did you have more than one conversation with him during that period of time?

[5574] A Yes, sir.

Q And were the conversations about the MacDonald killing at Fort Bragg in February of 1970?

A Yes, sir.

Q You recall exactly the subject matter of those conversations; is that right?

A Yes, sir.

Q Do you have a recollection—a clear recollection in mind—of what you said at that time?

A No; I just asked him to see where I stood, if I was in any trouble or what.

Q Do you have any other recollection of what you said to him about the events of February 17, 1970?

A Not specifically.

Q Now, did you have occasion to talk with Mr. Beasley anytime recently?

A Recently?

Q Yes.

A Well, yesterday.

Q Yesterday. Now, I guess we ought to make it clear. Was yesterday the first time that you and I had ever met and talked to each other?

A Yes, sir.

Q When I talked to you, was Mr. Smith, my [5575] colleague over here—was he present when we talked yesterday?

A Yes, sir.

Q When I told you that Mr. Beasley was also around, what did you say?

MR. BLACKBURN: Your Honor, we would OBJECT.

THE COURT: Well, yes, I think you better ask her a more specific question.

MR. SEGAL: All right, Your Honor.

BY MR. SEGAL:

Q Would you describe where you and Mr. Smith and I first met? Was it in a room here in the courthouse?

A Yes, sir.

Q And was there anybody else who was in that room when you and I and Mr. Smith met the first time?

A Well, Beasley came in and you also asked me if I wanted someone there to take notes.

Q Yes.

A And I said, "Yes," and you had someone come in. You also gave me permission to re-read the notes when we were done.

Q All right, let me ask you this: Mr. Beasley came in right after you and I met?

[5576] A Yes, sir.

Q Was that with your approval or disapproval that Mr. Beasley was there?

A A little bit of both.

Q A little bit of both. Did you not want him there?

MR. BLACKBURN: Your Honor, we would OBJECT to this.

THE COURT: Well, OVERRULED.

THE WITNESS: Well, I had been given some misguided information on him and I was sort of—

BY MR. SEGAL:

Q (Interposing) Did you and he talk it over?

A We cleared it up and then I was happy to see him.

Q As far as you were concerned, was Mr. Beasley present as a friend yesterday?

A Yes, sir.

Q Did you also see Jane McCampbell Zillioux yesterday?

A Yes, sir.

Q Did she come in and talk with you?

A Yes, sir.

Q Did you see Red Underhill yesterday?

A Yes, sir.

[5577] Q Did he also talk with you?

A Yes, sir.

Q Did Bill Posey also talk with you yesterday?

A Yes, sir.

Q By the way, was there anybody else who you knew who was a friend of yours present at any of these times?

A My fiance was allowed to come in and sit down.

Q What is his name?

A Ernest Davis.

Q He was sitting right next to you?

A Yes, sir.

Q All right, now, did each of those people I have mentioned to you—Jane and Red and Bill Posey—each tell you what they remembered of their conversations of the various dates that I have been talking about this morning?

A Yes, sir.

Q And, after they told you what they remembered, did it in any way revive or bring back a memory of what you have said?

A Only pieces of the conversation.

Q Did it revive your memory fully as to [5578] what you said to those persons about the MacDonald murders?

A No, sir.

Q Now, at that time when we were meeting yesterday and talking, do you recall me showing some photographs to you?

A Yes, sir.

Q In fact, we looked at quite a few photographs; didn't we?

A Yes, sir.

Q I want to show you these photos, please, to see whether we are talking about the same photos. They have previously been identified in the record as Government Exhibits G-775, 776, 773, 771.

[5579] BY MR. SEGAL:

Q Do you recall me showing you a group of photographs, of which the four I am about to show you now were part of them? Please take a look those, if you will, Ms. Stoeckley?

A Yes, sir.

MR. SEGAL: For the record, may it be indicated that the photographs I have exhibited to the witness are autopsy photographs, three of them of Kristen MacDonald and one of Colette MacDonald?

BY MR. SEGAL:

Q Now, when you looked at those three photographs of Kristen MacDonald, do you recall what, if anything, you said as far as any recognition of the person depicted there?

A No.

MR. ANDERSON: I could not hear her answer, Your Honor.

THE COURT: I understood her to say "no." Is there another question?

MR. SEGAL: Yes.

BY MR. SEGAL:

Q You are still examining those pictures, Ms. Stoeckley?

A No, sir.

[5580] Q Will you look at the picture that is marked G-771 of Mrs. Colette MacDonald? Do you recall what, if anything, you said when you saw that photograph yesterday?

MR. ANDERSON: OBJECTION.

THE COURT: SUSTAINED.

MR. SEGAL: May I have the basis of the objection, Your Honor, for the ruling?

THE COURT: Yes; you may ask this witness today if she recognizes it. It is not a question of what she told you during some private conference with her.

MR. SEGAL: It is only preliminary foundation, Your Honor.

BY MR. SEGAL:

Q Do you recognize—

THE COURT: (Interposing) What do you say about that picture today?

THE WITNESS: I don't recognize her.

BY MR. SEGAL:

Q All right; let me show you some other pictures. Do you recall looking through several large books of photographs yesterday, such as the one I am holding in my hand?

A Yes, sir.

[5581] Q I want to show you a series of five photographs from one of those books.

MR. SEGAL: For the record, let me indicate I am showing to the witness photographs taken from the crime scene at the MacDonald house prior to removal of the bodies, identified heretofore as Government 59, Government 70, Defendant Exhibit 22, Defendant Exhibit 84, Government Exhibit 145—these photographs having been identified as taken in the bedroom of Kristen MacDonald.

BY MR. SEGAL:

Q Ms. Stoeckley, will you please take a look at these photographs and first of all tell me if they seem familiar as among those you saw yesterday?

A I saw these yesterday.

Q Beg your pardon?

A I did see these yesterday.

Q Does anything in that last group of photos I have just showed you seem familiar to you?

A No, sir.

Q Does the picture of the person in the bed in any way seem familiar to you?

MR. BLACKBURN: Your Honor, we would OBJECT. She has answered the question.

THE COURT: Yes; she said nothing in [5582] any of the photos—was that your answer?

THE WITNESS: Yes, sir.

THE COURT: Nothing seems familiar to you?

(Witness nods affirmatively.)

MR. SEGAL: I need to ask one specific matter that I want her to look at and ask her whether that refreshes any recollection, or has any recollection.

MR. ANDERSON: We OBJECT:

THE COURT: I will let him ask her.

THE WITNESS: No, sir.

BY MR. SEGAL:

Q Let me just ask you about an item in the photos that are marked G-59 and G-145. I want to hold them up, please, if I may, and ask you if you see first of all an item in the foreground here, in the left corner of both of these photographs? Can you see that, Ms. Stoeckley?

A A hobby horse.

Q Beg your pardon?

A A hobby horse.

Q Does that item seem familiar to you in any way?

A No.

Q It does not?

[5583] (Witness nods negatively.)

Q Sometime after February 17, 1970, did you stop using LSD?

A Yes, sir.

Q Was there a specific reason why you did that?

A Only the reason I explained earlier.

Q Was there a reason that had anything to do with the MacDonald murders?

MR. BLACKBURN: Objection.

THE WITNESS: No, sir.

THE COURT: OVERRULED.

BY MR. SEGAL.

Q In February of 1970, did you own a hat of any sort?

A Yes, sir.

Q How would you describe that hat?

A Just an old, floppy hat.

* * * * *

[5588] Q In 1970, Ms. Stoeckley, was your hair similar to the way it looks today?

A Yes, sir.

Q Was it always the color that it is now?

A Yes, sir.

Q It has been that way for some years?

A Yes, sir.

Q Again, you've got a very quiet voice. I have to ask you to keep it up a little.

Did you ever wear anything over your hair in 1970?

A Only as a joke sometimes.

Q Well, whether it was serious or a joke, did you wear anything over your head?

A Yes, sir.

[5589] Q What was that?

A A blond wig.

Q And what was the length of the hair on the blond wig?

A Just a little bit longer than my own hair.

Q I'm sorry?

A A little bit longer than my own hair.

Q Does that mean about shoulder length?

A Yes, sir.

Q How long had you owned the blond wig?

A About three months, I guess.

Q Did you in the—January, February, 1970, own any boots?

A Several pairs.

Q Did you have both short and long ones?

A Yes, sir.

Q Well, now, when you say "short boot," I guess we should get our definitions right. How far up on the leg did you consider a boot to go before it was short?

A Ankle-high.

Q Did you have any boots at that time that were higher than that?

A Two other pairs. Two other pairs.

Q And how far up your leg did they go?

[5590] A One went up the calf and one went all the way up to the knee.

Q Were each of those boots the kind with the zipper on the side—you could slide into them?

A Both of them had zippers on the inside.

Q What color were each of those boots?

A The ones that went to the thigh were white, and the ones that went to the knee were brown.

Q Do you recall how tall you were in 1970?

A About 5′5″.

Q Did you weigh about what you weigh today?

A No.

Q Were you heavier or lighter than that?

A Lighter.

Q What was your weight in 1970, approximately?

A About 115.

Q 115 pounds?

A Uh-huh (yes).

Q I don't mean to pry, but I need to ask you, about what do you weigh now?

A About 138, 140.

(Defendant Exhibit No. 86 was marked for identification.)

BY MR. SEGAL:

Q Let me show you, Ms. Stoeckley, a [5591] photograph marked D-86 for identification, and ask if you recognized this picture?

A Yes, sir.

Q What does this picture show—you've got to keep your voice up, please?

A It is just my picture.

Q Is that a picture of yourself?

A Yes, sir.

Q Do you know when that picture was taken approximately?

A Yes, sir.

Q When was that?

A 1970.

Q Would that be about August of 1970? Does that sound about right?

A Yes, sir.

Q Is there anything unusual about your condition in this photograph when it was taken, or anything about your condition?

A Physical condition, you mean?

Q Well, physical or emotional condition?

A Well, I was definitely on drugs at that time it was taken.

Q I'm sorry. Go ahead—keep your voice up. Let me stand back a little bit. So you were definitely [5592] on drugs at the time that picture was taken?

A Yes, sir.

Q Do you know what drugs you were on at the time that picture was taken?

MR. BLACKBURN: Your Honor, we would OBJECT. She has testified that she was on drugs during this time and which drugs it was.

THE COURT: OVERRULED.

THE WITNESS: Judging from my eyes I'd say some kind of—well, the usual heroin and probably some barbiturates.

BY MR. SEGAL:

Q Who took that photograph if you know?

A Police department.

Q And what police department took that photograph?

A Fayetteville.

Q Fayetteville. Is that connected with an arrest at that time?

A Yes, sir.

MR. SEGAL: May the photograph be published to the jury, Your Honor.

THE COURT: Yes, sir.

(Defendant Exhibit No. 86 was received in evidence.)

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[5998] DIRECT EXAMINATION 11:07 a.m.

(resumed)

THE COURT: Try to keep your voice up so everybody can hear you.

BY MR. SEGAL:

Q Ms. Stoeckley, prior to our recess, I had asked you about a hat that you had owned in 1970; do you recall that?

A Yes, sir.

[5599] Q And can you try to give us a little bit better verbal description of the way it looked?

A It was just an old, floppy, brimless (sic) hat.

Q Let me show you a photograph that has been marked as Defendant Exhibit 87 for identification and ask whether the hat that is depicted in that photograph in some way resembles the hat that you owned in 1970?

A Yes, sir.

(Government Exhibit No. 87 was marked for identification and received in evidence.)

Q It does?

A Yes, sir.

MR. SEGAL: May that be published to the jury, Your Honor?

THE COURT: Yes, sir.

(Exhibit passed among the jury.)

BY MR. SEGAL:

Q Now, on February the 18th of 1970—I want to direct your attention to that date—did you have occasion to give your floppy hat to anyone?

A No, sir.

Q Did you see Detective Beasley on that date—February the 18th, 1970?

[5600] A I'm not sure. I probably did.

Q Did have any occasion in mid-February—after February 17, 1970—to show or give your floppy hat to anyone else, including Detective Beasley?

A I didn't give it away; no.

Q Well, I didn't mean to give it away.

A Well, I wore it all the time.

Q Did you see Detective Beasley on or about the early morning hours of February 18, 1970, at the Hickory Trailer Court?

A Yes, sir.

Q What happened, if anything, at that time involving yourself and Detective Beasley?

A There was a drug bust.

Q Were you taken into custody at that time?

A More or less.

Q Yes?

A Yes, sir.

Q Do you know whether or not you were detained for the CID to meet with you on that date or on a subsequent date?

A I was, but they never showed up so I was released.

Q What date was that that we are talking about—that you were held for the CID?

[5601] A It should have been about the 18th.

Q Now, you were picked up, you say, at the Hickory Trailer Park; is that right?

A Yes, sir.

Q And that is located where?

A In Spring Lake.

Q Spring Lake is near Fayetteville; is that right?

A Yes, sir.

Q Just a few miles outside of Fayetteville?

A Yes, sir.

Q You were taken down to the police station in Fayetteville?

A Yes, sir.

Q Did Detective Beasley take custody of you at some time there?

A Yes, sir.

Q Do you know why the CID was called in connection with an arrest that had been made in Spring Lake which was not on military property?

A It involved several Fort Bragg soldiers.

[5602] BY MR. SEGAL:

Q Do you know whether or not at that time you were being held for investigation in connection with possible involvement in the MacDonald murders?

A Only what I assumed.

Q You only assumed that?

(Witness nods affirmatively.)

Q Let me ask you—how long did you continue to own the floppy hat after February 17th, 1970?

A Maybe six or seven months. And it was stolen and I got another one.

Q You say, six or seven months, and then it was stolen?

A I started to wear it less and less frequently.

Q You started to wear it less and less frequently after February 17th, 1970?

A Yes, sir.

Q And for what reason was that?

A Because of the connection that people were coming up to me and assuming that, since I wore the floppy hat, I was the girl in question. And I stopped wearing the hat.

Q What about your blond wig? Did you wear that very much after February 17, 1970?

[5603] A Not at all; I got rid of it.

Q What's that?

A I got rid of the blond wig.

Q You got rid of the blond wig? What date did you get rid of the blond wig?

A 19th or 20th—somewhere around there.

Q 19th or 20th of February, 1970; is that right?

(Witness nods affirmatively.)

Q It is fair to say you got rid of it, again, because it connected you possibly with the MacDonald murders?

A Yes.

MR. BLACKBURN: OBJECTION.

MR. MURTAGH: OBJECTION.
THE COURT: SUSTAINED.

BY MR. SEGAL:

Q What was the reason you got rid of it?
A Because it connected me with the murder.
Q What about your boots? What happened to them?
A The heel came off of one of them, and I just got rid of them.
Q Got what?
A The heel came off and I got rid of the boots.
[5604] Q Didn't bother to fix it; right?
A No.
Q What pair of boots did the heel come off?
A The white ones.
Q The white ones? Where did you get rid of them?
A I threw the boots in the trash can and I burned the wig.
Q Did that happen around the 18th or 19th of February that you got rid of them?
A Yes, sir.
Q Where is it that you broke the heel on those boots?
A I am not sure. I just put them on one morning and found out the heel was broken. I don't know where I broke it at.
Q This arrest that you were taken in custody for on the 18th of February—did any CID Agents show up to talk to you about that—whatever matter it was that you were being held in custody for?
MR. BLACKBURN: OBJECTION.
THE WITNESS: Not at that time.

BY MR. SEGAL:

Q Not at that time? At any time in February, 1970, did any CID Agent come up to you and talk to you [5605] about it?
A It was either February or March. I am not sure. I was in jail, and two came down to see me.

Q You are talking about the drug arrest, or some other matter?

A It was a drug arrest.

Q They did not talk to you anything about the MacDonald case, did they?

A That was what they came and talked to me about.

Q I am sorry: I misunderstood you. They came and talked to you about what, then?

A About the MacDonald murders.

Q Did you talk to them about that?

A Yes, sir.

Q Do you know what you told them at that time?

A No, sir.

Q Do you have any recollection at all about what you said at that time?

A No, sir. I just went through the same thing about not knowing where I was that night and that was all I could tell them.

Q Ms. Stoeckley, do you know what your blood type is?

A Not offhand.

[5606] Q Not offhand? I want to ask you one question slightly out of order. I neglected to get to it before, but you told us you went to Fort Bragg a number of times because you went to Womack Army Hospital; is that right?

A Yes, sir.

Q Did you also visit other areas at Fort Bragg?

A On occasion.

Q Do you know any shopping center at Fort Bragg—any shopping area at Fort Bragg?

A Yes, sir.

Q Where is the shopping area located?

A I used to stop at one on my way to Womack sometimes, or going back home.

Q Which one was that?

A Melony Village.

Q Melony Village? Do you know what the name of the streets were where that intersected?

A One is Honeycutt.

Q Now, to your knowledge, is there a picture that now exists that shows the way you looked in 1970 with the blond wig on, or with the blond wig and your floppy hat on?

A I never had a picture taken with that wig on.

[5607] MR. SEGAL: At this time, I propose to show her an exhibit.

MR. BLACKBURN: Your Honor, we would OBJECT to this.

MR. SEGAL: That figures.

MR. MURTAGH: We OBJECT to that comment, Your Honor.

THE COURT: OVERRULED.

BY MR. SEGAL:

Q I want to show you an exhibit which is marked D-89 for identification.

(Defendant Exhibit 89 was marked for identification.)

I would like for you to take a look at this exhibit, which I think it is fair to describe to you as an artist's representation. Does this exhibit, first of all, appear to be a representation—a fair representation, as an artist might view it—of the way you would look in February of 1970 or January, 1970, with your hat and wig on?

A Not completely; no.

Q All right; in what way would you think it was different—it would be different to more correctly reflect the way you look?

A The chin is not that square.

[5608] Q You say the chin—your actual chin—is, you don't think, quite as square as the artist has shown it?

(Witness nods negatively.)

Q You have to say "yes" or "no," please.

A No, sir.

Q Anything else?

A The hat was square at the top, instead of rounded like this one.

Q A little squarer at the top? Would that be correct? Or a lot squarer? I don't mean to give you the value.

A Just a little bit.

Q A little squarer? Aside from those two items does that picture fairly represent the way you looked if you wore your floppy hat and wig at that time?

A Yes, sir.

MR. SEGAL: May it be published to the jury, Your Honor?

MR. ANDERSON: OBJECTION.

MR. BLACKBURN: OBJECTION.

THE COURT: Well, I suppose that it is objectionable, in that this witness says that if you are trying to show how she would have looked, I don't get the impression that this witness agrees that that is the way she would have looked. She says the hat is different and [5609] the chin is different.

MR. SEGAL: Well, Your Honor, the statement about the hat as slightly squarer—we can correct that—

THE COURT: (Interposing) Well, now, the word "slightly squarer" was your word.

MR. SEGAL: I asked her if that was her words. Did she accept that, or was I wrong? Let me put it back to you.

THE COURT: Take a look at this photograph (sic) and see whether or not you think that it looks like you would have looked with your hat on and your chin at that time?

THE WITNESS: My hat on and my chin?

THE COURT: Yeah; your hat on and your chin. It is a fair representation of how you would have looked at that time? Just say "yes" or "no."

THE WITNESS: Yes, sir.

THE COURT: All right, now; I will let you proceed.

MR. SEGAL: If Your Honor please, I would like to publish it in fairness with the square hat, the original—the squared hat in the drawing here.

THE COURT: All right.

[5610] (Defendant Exhibit 89 was received in evidence.)

(Exhibit passed among the jury.)

[5611] BY MR. SEGAL:

Q After you were interviewed in Nashville, Tennessee, in 1971, when did you have occasion to leave there—what year or month, if you recall?

A I am not sure of the month. It was sometime I think in late '73 or early '74.

Q At that time was anyone contacting you or had anyone contacted you about the MacDonald case again?

A While I was in Nashville?

Q Yes.

A Yes, sir.

Q Who was that?

A Detective Beasley and Dick Mahon from the CID.

Q We know about an early contact, you know, in 1971. Are you talking about a second time he came to see you?

A No, sir.

Q Did your leaving Nashville at that time have anything to do with the fact that there was any investigation pending in the MacDonald case?

A No, sir.

Q Where have you lived? Just tell us the cities where you have lived since that time until you were brought here the other day?

[5612] A Well, I went back to Fayetteville; Cincinatti, Ohio; Daytona Beach; Deland, Florida; Greenville, South Carolina; Columbia, South Carolina; up to Wahalla, South Carolina. That's where I was picked up.

Q And you told us before that you didn't have any permanent address during that period of time after you left Nashville?

A No, I never stayed in those places.

Q Did you know that anyone was trying to locate you to interview you in connection with the MacDonald case?

A Yes, sir.

Q And what if anything did you do when you found out that they were looking to interview you?

A I just didn't want to be bothered so I moved again.

Q How many times did you move to avoid being interviewed?

A About three times.

Q Were you present in that house in Wahalla last week, when a woman lawyer came to that house in the evening?

A When a woman lawyer?

Q Yes, a black woman?

[5613] A No, sir.

Q You were not, all right.

I want to show you some photographs that you may have seen yesterday also.

MR. SEGAL: They are marked for the record Government Exhibits 23, 24, and 75? These have been previously described in this case as being some of the photos taken of the MacDonald living room.

I ask you to look at all three of them first please.

(Witness complies.)

BY MR. SEGAL:

Q Have you done that, Ms. Stoeckley?

A Yes, sir.

Q I ask you to give particular attention, if you will, please, to the photograph which is marked G-75, which shows sofa, coffee table, and part of the hallway and some clothing in the MacDonald house. Would you look at that, please?

Do you have any reason to believe that you have seen that scene before prior to being shown the photographs yesterday and today?

A No, sir.

Q Do you have any reason to believe that you were ever standing in that place?

[5614] A No, sir.

MR. SEGAL: May we approach the bench, Your Honor?

BENCH CONFERENCE

MR. SEGAL: At this time, Your Honor, I ask for leave of Court to take this witness as on cross, because she is a surprise and hostile witness.

I represent to the Court that during the interviews with me and with other persons present she stated that when she looked at the picture she had a recollection of standing over a body holding a candle, seeing a man's body on the floor.

I also may say, Your Honor, we are now down to the bottom five or six critical things that she revealed yesterday. I have a feeling, based upon her answer to this one now, that when and if I ask her in direct fashion, that I may get negative answers.

I had no anticipation of that, because yesterday throughout the time that she made these statements, we accepted them, did not expect contrary.

We have not had any different statements from her and we feel that we are entitled to the plea of surprise as well as the fact, I think, at this point—the extent of her hostile relationship not in terms [5615] of manner but the hostility of her interest to the Defendant.

I am going to tell Your Honor the other things that she has said. Would that be appropriate now to expedite, or should we do it one at a time?

THE COURT: Well, if it will save any trips up here maybe you should tell us now.

MR. SEGAL: She has already actually said something, and I did not want to raise a surprise question. I want to do it all at one time. The photograph that I showed her of the bedroom of Kristen MacDonald: during the interview yesterday, she stated that she remembered riding the rocking horse when she looked at that picture.

She also stated yesterday she remembered standing at the end of the sofa holding a candle. She also said when she saw the body of Kristen MacDonald—the one when she was clothed, with the baby bottle—that that picture looked familiar to her.

That scene looked familiar. She also said when she was shown the photograph of Colette MacDonald—the same one I showed her today—that she said that the face in that picture looked familiar, except that the chin was broken and made it a little hard.

She also stated—and I'm going to get to it—[5616] she's gotten to the point where she does not sound like she is going to cooperate further—that she was standing of the corner of Honeycutt across from Melony Village.

She has a recollection of standing there during the early morning hours of February 17th, 1970. She further stated yesterday, and I intend to ask her now, that she has a recollection of standing outside the house looking at her hands and saying, "My God, the blood; oh my God, the blood."

She said that took place February 17, 1970. There are witnesses to each of these things. I must say, Your Honor, there were persons present the entire time this took place.

I intend to now ask her directly each of these questions. If she refuses or denies her statements I ask for leave to confront her:

"Did you not say that yesterday when you were confronted with these photos?"

If she persists in denying it we will of course impeach her as we have the right to impeach her under the rules.

Although we have called her as a witness, there are rules that permit that to be done.

When I am done with that I intend to turn her over for cross-examination.

[5617] MR. BLACKBURN: Of course, I was not there when she talked with the Defense yesterday, but in her interview with the Government none of those statements were made. She specifically told us—

THE COURT: (Interposing) Did you ask her any?

MR. BLACKBURN: Yes, sir. She specifically told us that she had been shown the photographs and we asked her, "Did you recognize any of the scenes in those photographs?"

The answer was no. I asked her, "Have you ever been in that house?" She said no. I said, "Do you know anything about that?" "No." "Who do you think did it?" "Dr. MacDonald." You know, it just went one right after the other.

I discussed—I told Mr. Smith last night what she told us. I was under the impression to this very moment that what she told us was essentially what she told them.

It is difficult for me—you know—I am not saying that they are not saying what she said. I just don't know which way it is, because she has not indicated anything to the Government.

MR. SMITH: Judge, here I think is where we are. Generally, she said to us the same thing [5618] and that is, "I don't remember." But in two or three or four instances—whatever the list would reveal—she says something which would give an interesting insight into her mind.

I would submit that we have a right to cross her on those; if she denies them then they have a right to impeach her on the statements or show that she did not say anything like that.

THE COURT: I am not going to cross the hostility thing until there is a reason shown to indicate it; but I am going to ask the witness a question myself.

(Bench conference terminated.)

THE COURT: Ms. Stoeckley, how long did you spend yesterday talking to Defense counsel in this case—Mr. Segal, Mr. Smith, and others?

THE WITNESS: About three and a half to four hours.

THE COURT: Did you thereafter talk to the Government's attorneys?

THE WITNESS: Yes, sir.

THE COURT: Had you ever seen them and talked to them before?

THE WITNESS: No, sir. One member I had before.

[5619] THE COURT: Now, did you tell both sides the same story?

THE WITNESS: As far as I know, yes, sir.

THE COURT: All right, that was the question I was going to ask.

BENCH CONFERENCE

MR. SEGAL: The point—each of the things that I am representing to the court were said in the presence of other witnesses. It is not a question of my saying it. It is not going to be counsel and the witness.

I intend to fully call those people.

THE COURT: I am confident of that. You would not stand here and tell me that she said one thing unless she said it.

MR. SEGAL: And not be able to back it up.

THE COURT: But I tell you what, if Blackburn tells me that she told him that, I am going to say that too. I don't know where you are going with this kind of testimony, but go on. I am not going to, on the 25th day of the trial—I ain't going to stop now just because it don't make any sense to me.

[5620] MR. BLACKBURN: Judge, does that mean that he can ask as on cross?

THE COURT: No, I have not said that. I said I would make that decision when we come to it.

(Bench conference terminated.)

[5621] THE COURT: Any further questions of this witness?

MR. SEGAL: Yes, Your Honor—a few basic matters. We are getting to the end of this.

BY MR. SEGAL:

Q Ms. Stoeckley, I asked you before to take a look at some photographs of what we have had identified here at the trial as the body of Kristen MacDonald—Government 60, 70, 59 and 84. Do you recall these photographs?

A Yes, sir.

Q When I asked you before whether they seemed familiar to you, do you recall saying that the scene did not seem familiar to you as your answer today in court?

A Yes, sir.

Q Do you not recall at this time that yesterday, as you were sitting in the room outside the courtroom, when you were shown—

MR. BLACKBURN: (Interposing) Your Honor, excuse me. We would OBJECT to this type of question.

THE COURT: Let me just ask the question. Were you asked that same question by this lawyer yesterday?

THE WITNESS: Yes, sir.

THE COURT: What did you say then?

[5622] THE WITNESS: Well, I studied the picture for a while, and I don't know. I just don't recognize it.

THE COURT: Is that what you told him, or did you tell him something different?

THE WITNESS: Well, the younger girl just looked like—I don't know. She looked like a little girl I had seen before. Thats all.

BY MR. SEGAL:

Q Do you recall talking, when I was not in the room, in the presence of Jane, about those pictures?

A I was just trying to see if I had ever seen any members of the family before.

Q I understand that, Ms. Stoeckley, but I am asking you, though—

A (Interposing) I said I could have seen Colette somewhere on Post.

Q Let's back up a second, though, please. We've got two subjects together and I need to do one at a time. Do you recall yesterday that when I was not asking you any questions, but you were talking with Jane Zillioux, the lady from Nashville—do you recall that when you sat there looking at that picture you said—

MR. BLACKBURN: Your Honor, we would OBJECT.

[5623] THE COURT: Yes; I will SUSTAIN that.

MR. SEGAL: Your Honor, there is a plea of surprise in this matter in regard to the answer. I think we are entitled to present the question in this form—

THE COURT: (Interposing) Let me ask her one more time.

MR. SEGAL: Yes, Your Honor.

THE COURT: Have you told anybody else when this lawyer was not there any different story about whether or not you recognized these pictures or anybody in them?

THE WITNESS: What I just said about Colette and the youngest girl.

THE COURT: He wants to know, though, have you looked at these pictures and told somebody else that you did, in fact, recognize this scene, or that you had been there, or something of that nature?

THE WITNESS: Not that scene.

BY MR. SEGAL:

Q Let me hand the group of photos back to you again. Ms. Stoeckley, do you recall, just as you are now, sitting on the stand, looking at those photos—do you recall staring at those photos at some length when Jane

Zillioux was sitting just about next to you in that [5624] room in this building?

A I mentioned something about the rocking horse.

Q Yes; all right, will you tell us about the rocking horse—what you recall saying about it?

A I made some comment about it being broken or something.

Q Does the picture show anything about a broken rocking horse?

A I can't tell if it is broken or not. It looks like it is.

Q Beg your pardon?

A It looks like it is broken.

Q It looks like it is broken? Let's take a look, and if you can show us, perhaps—may I hold up this photo, please—the photo that is marked G-59? As a matter of fact, we even have a larger one of this. May we use that, please? Well, in this cornucopia of photos, we are having a little trouble finding it. Mr. Murtagh, do you know where it is?

MR. MURTAGH: No; I don't.

MR. SEGAL: You wouldn't know where it is; all right.

(Pause.)

BY MR. SEGAL:

[5625] Q Ms. Stoeckley, I am going to put here on the easel, so that the members of the jury can also look with you the first of two photos. One is an enlargement marked G-982; then the other is marked G-145(a). Can I impose upon you, please, to perhaps step down here next to the witness stand, look at the photograph and tell me, how does it appear to be broken in any fashion?

A The part going to the spring.

Q That looks broken to you; is that right?

(Witness nods affirmatively.)

Q Now, let me show you the photograph that is marked 145(a). You also see in the lower left-hand corner the rocking horse; is that right?
A Yes, sir.
Q Does that look broken to you there also?
A No.
MR. SEGAL: You may go back to the stand, please.

[5626] BY MR. SEGAL:

Q Now, do you recall what you first said when you first observed that photo yesterday in the book that I showed you—the black one?
MR. ANDERSON: OBJECTION.
THE COURT: OVERRULED.

BY MR. SEGAL:

Q Please, Ms. Stoeckley, what did you say about the rocking horse?
A That was the first thing I muttered is that it was broken, and when you asked me what I said, I just said nothing.
Q Beg your pardon?
A You asked me what I said, and I said nothing and shrugged it off.
Q Did you say anything at all about your having touched or used that rocking horse at the time?
MR. ANDERSON: OBJECTION.
THE COURT: OVERRULED.
THE WITNESS: Not at that time; no.

BY MR. SEGAL:

Q At what time?
A I don't even remember saying that yesterday at all.
Q At what time did you ever say anything [5627] about touching the broken rocking horse?
MR. BLACKBURN: Your Honor, we OBJECT.
THE COURT: I SUSTAIN that.

MR. SEGAL: I thought the witness said, "Not at that time."

BY MR. SEGAL:

Q What did you mean, Ms. Stoeckley, when you said "Not at that time"?
A Just that I didn't say it yesterday; no.
Q Did you ever say it?
A Not that I recall.
Q Ms. Stoeckley, do you have a recollection of standing or of ever being outside of 544 Castle Drive late at night?
MR. BLACKBURN: Your Honor, we OBJECT.
THE COURT: OVERRULED.

BY MR. SEGAL:

Q Do you have such a recollection?
A No, sir.
Q Do you have a recollection of whether conditions in the vicinity of 544 Castle Drive on February 17, 1970?
A No, sir.
MR. SEGAL: If Your Honor pleases, I plead surprise for the reasons I have already stated.
[5628] THE COURT: Ask your question.

BY MR. SEGAL:

Q Did you not say yesterday when you were sitting in the witness room that you recalled standing outside on February 17th in the early morning hours in the rain and looking at your hand?
MR. ANDERSON: OBJECTION.
THE COURT: OVERRULED.

BY MR. SEGAL:

Q Do you not recall saying that?
A No, sir.

Q Do you recall looking at your hands at any time on February the 17th, 1970, in the early morning hours?

A Not on that day; no.

Q Well, I am concerned about that early morning.

A No, sir.

Q Did you not say yesterday when you were in the witness room that you had a recollection of looking at your hands and seeing something on them? Do you recall that?

MR. ANDERSON: OBJECTION.

THE COURT: OVERRULED.

BY MR. SEGAL:

[5629] Q What's your answer, Ms. Stoeckley?

A No, sir.

Q Are you saying you did not say that yesterday?

A I don't remember saying it; no.

Q Do you recall saying it to Jane Zillioux? Do you want me to bring her in?

MR. BLACKBURN: OBJECTION.

MR. MURTAGH: OBJECTION.

MR. SEGAL: It is a question of recognition of who she was talking to. It ought to be an issue here.

THE COURT: Well, I believe the witness has indicated that she talked to somebody named Jane. I don't know what that last name is. I can't hear it. Did you talk to somebody named Jane yesterday?

THE WITNESS: Yes, sir.

THE COURT: What did you tell her about looking at your hands?

THE WITNESS: I don't remember saying anything about my hands.

THE COURT: All right.

BY MR. SEGAL:

Q Did you say anything to Mr. Beasley about [5630] it?

A No, sir.

Q To Mr. Underhill yesterday?

A No, sir.

Q Were you on the corner of Honeycutt and Lucas near Melony Village on the morning of February 17, 1970?

A Not that I know of.

Q Do you recall being asked about that yesterday?

A Yes, sir.

Q Do you recall what you said about that yesterday?

A I said I had been on that corner before, but I couldn't have been there that morning.

Q How do you know that you couldn't have been there on that morning if you don't know where you were?

MR. BLACKBURN: OBJECTION.

THE COURT: I will SUSTAIN your objection. You can't argue with this witness.

BY MR. SEGAL:

Q All I want to know is: I thought you told us before that you did not know where you were between midnight and 4:35 on February 17; that was [5631] your testimony; wasn't it?

A That's true.

Q Can you say for certain that you were not on the corner of Melony (sic) and Honeycutt that morning?

A No; I can't.

Q Now, I asked you a few minutes ago to look at the pictures—

MR. SEGAL: Your Honor, indulge me for a second.

(Pause.)

BY MR. SEGAL:

Q Ms. Stoeckley, I asked you a few minutes ago to look at those pictures of what we now know to be the living room of the MacDonald house; do you recall that?

A Yes, sir.

Q I particularly asked you to look at one photograph which depicts both the sofa and the coffee table—that would be G-75; do you recall that?

A Yes, sir.

Q Was that not one of the photographs that I showed you yesterday in the books of photographs?

A Yes, sir.

Q Do you recall now what you said about [5632] what knowledge or do you recall what you said about having been there or not been there back on February 17, 1970?

A I said the sofa looked familiar, but I've seen a lot of sofas that looked like that.

Q Do you recall saying something about seeing a body there?

A I said there was nothing on there.

Q Do you recall yesterday saying in the witness room you recalled seeing a body there on the sofa or the floor when you were holding a candle; do you recall making that statement?

A That was only like in a dream or something like that.

Q Well, first of all, let's find out: do you recall making that statement? We need to know whether we are talking about the same thing.

MR. BLACKBURN: Your Honor, I think we would OBJECT. I think she has answered that.

THE COURT: Yes, I will SUSTAIN the objection. Ask her another question.

BY MR. SEGAL:

Q Do you recall the day that the MacDonald family funerals were taking place at Fayetteville at Fort Bragg, North Carolina?

[5633] A More or less; yeah.

Q What color clothing did you put on—wait a minute. Before I get to that—had you heard about the funeral on the radio or read in the newspaper about the funeral that was taking place?

A I wasn't really paying attention to it; no.

Q You were not. Did you know what was happening, though—what was taking place at Fort Bragg? Were you aware of that?

A No; I wasn't aware of it.

Q Well, let me ask you: the week after—during the week of February 17th through February 21st of 1970, did you have occasion to get a floral wreath from a florist?

A Yes, sir; several of them.

Q Several of them. They were funeral wreaths; were they not?

A Yes, sir.

Q Where did you set these funeral wreaths up?

A Along a fence between mine and Mr. Posey's house.

Q As a matter of fact, what color clothing were you wearing on the day that you set up these [5634] funeral wreaths outside your house?

A Black.

Q Black. Funeral black?

A No; I always wore black or purple.

Q As a matter of fact, what was your usual color of clothes that you wore?

A Black or purple.

Q A purple vest, a purple skirt—was that your usual clothing?

A (No response.)

Q How many funeral wreaths did you have outside your house on that day?

A I don't know—five, six.

Q Why did you set up funeral wreaths during that week after the MacDonald family murders?

A It wasn't just at that time. There was a florist up the street from us, and they used to throw them out all the time, and they were good flowers and stuff, and we used to just pick them up and take them home.

Q It was just a coincidence you are saying?
A Probably; yes.
Q Now, I would like to know something about the people you were associating with in 1970; all right?
[5635] A Yes, sir.
Q Did you have a friend by the name of Allen?
A Allen?
Q Yes.
A I may have at that time.

[5636] BY MR. SEGAL:

Q Well, let me put it to you this way: you had a number of acquaintances in the Haymont Community; is that right?
A Yes, sir.
Q Were there among your acquaintances any persons that you believe, based upon your knowledge of them, who were capable of doing the kinds of things you knew happened to the MacDonald family?
MR. BLACKBURN: OBJECTION.
MR. ANDERSON: OBJECTION.
THE COURT: SUSTAINED.
MR. SEGAL: Just one second, Your Honor.

(Pause.)

BY MR. SEGAL:

Q Didn't you know Allen Mazzarole in 1970?
MR. BLACKBURN: OBJECTION, Your Honor.
THE COURT: OVERRULED.

BY MR. SEGAL:

Q Did you know him?
A Yes, sir.
Q How would you describe his appearance?
A Very clean-cut, well-dressed.

Q A nice-looking man?

[5637] A Yes.

Q About approximately what age?

A About 24 or 25.

Q In what connection did you know Allen Mazzarole?

A I used to deal for him.

Q You used to do what?

A I used to deal for him.

Q You mean, you worked for him in the selling of drugs?

A Yes, sir.

Q Did you also have a personal relationship with Allen Mazzarole?

A Yes, sir.

Q Was Allen Mazzarole a man—well, do you know who Allen Mazzarole worked for?

A He was in the Army.

Q He was in the Army at the time?

(Witness nods affirmatively.)

Q What kind—what was his connection with the drugs that you were dealing? Did he supply them to you?

A Yes, sir.

Q What kind of drugs were they?

A Usually LSD.

Q Was Mr. Mazzelrole engaged in transporting [5638] drugs?

A Yes, sir.

Q Transported them from where to where?

A I don't know from where, but I got them.

Q Got them off of Fort Bragg?

A (Witness nods negatively) No.

Q Was there any quantity of drugs you were handling at that time coming from soldiers who were arriving from Vietnam?

A Through him?

Q Not necessarily through him, but generally speaking at that time?

A Yes, sir.

Q Did Allen Mazzarole ever strike or do violence to you?

MR. BLACKBURN: OBJECTION, Your Honor.

MR. SEGAL: I think we have a right to show the nature of her acquaintances, given the context of this total case and the facts we have, Your Honor.

MR. BLACKBURN: Your Honor, may we approach the Bench?

* * * * *

[5641] BY MR. SEGAL:

Q During 1969 and 1970, Ms. Stoeckley, were you ever beaten up by other members of the groups of people [5642] you dealt with and related with in Fayetteville?

A No, sir.

Q Have you suffered other injuries since that time from people that you have been dealing with and working with in drugs?

A Yes, sir.

Q Your present injury now—your arm injury—is that a result of a beating someone gave you with a steel bar recently?

A Yes, sir.

Q Was that about drugs, too?

A Yes, sir.

MR. SEGAL: I have no further questions.

THE COURT: Any cross-examination?

MR. BLACKBURN: Yes, sir; I believe a few questions.

THE COURT: All right, sir.

CROSS-EXAMINATION 11:57 a.m.

BY MR. BLACKBURN:

Q Ms. Stoeckley, directing your attention to, I guess, the 16th or 17th of February, at 12:00 midnight, I believe you testified on direct examination you were standing in your driveway; is that correct?

[5643] A Yes, sir.

Q Where was your house?
A Clark Street.
Q You were with Greg Mitchell?
A Yes, sir.
Q How long did you stand in the driveway with him? Do you recall?
A Not really.
Q I'm sorry?
A Not really; I don't know how long it was.
Q He gave you a hit of mescaline, which you took at that time?
A Yes, sir.
Q Now, how far is Clark Street from Fort Bragg, if you know?
A I don't know how many miles. I would say about 20 minutes away.
Q About 20 minutes away?
A Yes, sir.
Q Let me hand you Defendant Exhibit Number 80 and ask you to take a look at it?

(Witness complies.)

Q Have you had a chance to look at it?
A Yes, sir.
Q Would it be fair to say that at 12:00 [5644] midnight on the 16th of February, 1970, you were not in that location?
A Yes, sir.
Q You were on Clark Street in your driveway?
A Yes, sir.

[5645] BY MR. BLACKBURN:

Q Now, you have testified that you had a blond wig; is that correct?
A Yes, sir.
Q Where did you usually keep the blond wig?
A In a closet in my apartment.

Q On Clark Street?

A Yes, sir.

Q Did you wear it very frequently?

A Infrequently.

Q You wore it sort of as a joke as I understand you?

A Yes, sir.

Q When you were talking with Greg Mitchell in the driveway, do you recall whether or not you had the blond wig on or off?

A I did not have it on. He did not like it.

Q He didn't like it? And, if you didn't have it on, it would be in the closet; is that correct?

A Yes, sir.

Q I believe you testified that you had two or three pairs of boots?

A Yes, sir.

Q You wore those frequently?

A When I wore shoes, that is what I wore—was [5646] the boots.

Q You don't recall which pair of boots you had on that night; do you?

A No, sir.

Q Now, the ankle boots that I think you said you had, what color were they?

A Black.

Q Black?

A Yes, sir.

Q Did they zip up or did they lace up or what?

A The black ones were just slip on and then they buckled around the ankle.

Q It is fair to say that you just don't know where you were between 12:00 o'clock midnight and about 4:30 or 5:00 o'clock the next morning; is that correct?

A Yes, sir.

Q Directing your attention to that photograph and assuming for a moment, if you will, that the MacDonald apartment is this one right here (indicating), to your own personal knowledge, Ms. Stoeckley, have you ever been inside the MacDonald apartment before?

A No, sir.

Q At any time?

A Not that type; no, sir.

Q I am sorry?

[5647] A Not that type of apartment; no, sir.

Q It is fair then to say that it is your testimony that to your own personal knowledge, you have never been in that particular apartment at any time?

A Yes, sir.

Q When was the first time you have seen Dr. MacDonald?

A To my knowledge, this morning.

Q This morning?

(Witness nods affirmatively.)

Q It is the first time to your knowledge that you have ever seen him; is that correct?

A Yes, sir.

Q Let me show you this picture of Kristen MacDonald again. Do you need to look at it again?

A No. I have got one.

Q You have got one, okay. Besides seeing that scene in those photographs, to your own knowledge, when was the first time you have ever seen that scene?

A Yesterday.

Q And how did you see it?

A In the pictures.

Q You were shown a number of photographs yesterday; were you not?

A Yes, sir.

[5648] Q And those photographs purported to be the crime scene of the MacDonald apartment; is that true?

A Yes, sir.

Q Do you recall ever seeing any of those scenes prior to yesterday?

A Not these particular scenes; no, sir.

Q Now, you testified that the little girl in that bed—you had seen a little girl like that; is that your testimony?

A Yes, sir.

Q Where might you have seen such a little girl?

A I worked a lot with children. I could have seen one like that anywhere.

Q I believe you testified that you might have seen Colette on post; is that correct?

A Yes, sir.

Q To your own knowledge, did you participate in the killings of the MacDonald family?

A No, sir.

Q How do you feel towards children?

A I love children.

Q Of your own personal knowledge, did you kill Colette MacDonald?

[5649] A No, sir.

Q How about Kristen?

A No, sir.

Q How about Kimberly?

A No, sir.

Q Did you try to kill Dr. MacDonald?

A No, sir.

Q Do you know who did?

A No, sir.

Q Do you recall ever being in the MacDonald apartment carrying a candle?

A No, sir.

Q Now, I believe you testified on Direct that you have been through Corregidor Courts before; is that correct?

A I cut through there quite a bit.

Q That was sometimes on the way to Womack?

A Either Womack or over to the Officers' Club or anything. I used to take Extension Courses at the college over there, too, and cut through there.

Q That would have been prior to 1970; is that correct?

A Yes, sir.

Q Did you ever have occasion that you can specifically recall to go on Castle Drive by the [5650] MacDonald apartment?

A Not until after the murders.

Q Not until after the murders? Well, how long after —do you remember?

A About a year later.

Q About a year later? Why did you go back, if you recall?

A Just to see if anything would look familiar or jolt something in my memory or something.

Q To see if anything looked familiar? Did it?

A No, sir.

Q Did it jolt anything in your memory?

A No, sir.

Q Now, after the 17th of February, 1970, I believe you testified that you were arrested or picked up or questioned concerning this matter; is that correct?

A Yes, sir.

Q Did your picture ever appear in the paper in the Fayetteville newspaper to your knowledge?

A I don't think my picture did; no, sir.

Q Has your picture ever been in the paper to your knowledge?

A Not until yesterday.

Q How long did you live in Fayetteville after [5651] the murders?

A About a year.

Q About a year? Were you questioned quite a bit concerning the MacDonald murders after they occurred?

A I wasn't the only one.

Q I don't mean to imply that you were, but were you personally questioned?

A Yes, sir.

Q Were you ever hassled by the police concerning this situation?

A The City Police; yes, sir.

Q Is it fair then to say that in your opinion the City Police of Fayetteville hassled you about this; is that correct?

A Yes, sir.

Q You testified that you got rid of the blond wig; is that right?

A Yes, sir.

Q Tell us again why you did that?

A Well, I already had people coming up to me and making comments concerning the murders and everything. I just wanted to get rid of anything that might look like I had anything to do with it.

Q That was to keep you from being hassled by [5652] the police; isn't it?

A Yes.

MR. SEGAL: That is what she said. It is OBJECTED TO, Your Honor.

BY MR. BLACKBURN:

Q I am sorry—what did you say?

A Yes.

THE COURT: I think she had answered the question, too, but we have a way of doing everything in duplicate, so I will let him ask it twice.

MR. SEGAL: All right, Your Honor.

BY MR. BLACKBURN:

Q For the second time, what was your answer?

A What was the question?

Q I take it then that at some occasion, you got rid of the hat because you felt you were being hassled by the police; is that correct—I mean the wig?

A The wig; yes.

Q Now, is it a fair statement to say that what you know of the MacDonald killings is a result of what you have been told by somebody else?

A As far as I know.

Q Let me ask you this question: the fact that you did not know where you were for the five hours or four and a half hours from 12:00 until 5:00 o'clock [5653] that morning and the constant comments that you testified that you got from other people concerning the murders, did that cause you to have some concern yourself?

A Yes, sir.

Q In other words, you did not have an alibi for where you were; did you?

A No, sir.

Q Did you ever wear gloves very often?

A No, sir.

Q Did you ever wear gloves at all?

A Very rarely. It had to be pretty cold.

Q Do you know what the weather was like at about midnight or do you recall?

A No.

Q I am sorry?

A Not really.

Q You don't recall if it was raining or not?

A No. As far as I know, it wasnt' raining.

Q What about the weather at about 4:30 or 5:00 that morning—do you recall the weather at that time?

A I didn't pay that much attention; no, I don't remember.

Q When was the first time on the 17th of [5654] February, 1970, that you heard of the MacDonald killings?

A After I had been in my apartment for about 30 minutes.

Q How did you hear?

A There was a news bulletin on the radio.

Q That was the first time you had heard about it?

A Yes, sir.

Q You testified that you were into witchcraft; is that correct?

A Yes, sir.

Q And there were high priestesses—were you a high priestess?

A There weren't any as far as I knew. There were no other—well, I wasn't a witch anyway. There wasn't anyone interested in witchcraft in that area.

Q I am sorry. You will have to speak up.

A There wasn't anyone interested in witchcraft in that area where I lived.

[5655] BY MR. BLACKBURN:

Q Is it fair to say you were reading about witchcraft?

A Right.

Q But you were not a witch yourself?

A No.

Q Did you ever wear white sheets or white robes around?

A No.

Q You never wore choir robes or anything like that?

A No.

Q You spoke of the term "pig," talked about pigs; and I assume you talked about that frequently or used that term frequently?

(Witness nods affirmatively)

Q Who did you refer to as pigs in 1970?

(Witness looks at the Court.)

THE COURT: Does that answer your question?

MR. SEGAL: We OBJECT, Your Honor.

MR. MURTAGH: We were surprised.

MR. BLACKBURN: Your Honor, that was a surprise answer.

THE WITNESS: I did not mean that. That [5656] wasn't towards you.

THE COURT: She is trying to retract it now, but it is recorded for all history.

MR. BLACKBURN: I think she should be given every opportunity to retract, if that is her answer.

THE WITNESS: It is the law enforcement—

THE COURT: (Interposing) All right, she is going to answer your question now. Go ahead.

THE WITNESS: Any law enforcement agent.

BY MR. BLACKBURN:

Q In other words, you called the police "pigs"?

A Right.

Q You didn't think of children as being pigs?

A No.

Q Or ladies as pigs?

A No.

Q You didn't think of Colette, Kristen and Kimberly as pigs, did you?

A No, sir.

Q Now, about floral wreaths—you said that you said that you put four or five floral wreaths on—

A (Interposing) On a fence.

Q Where was the florist?

[5657] A About half a block up the street in Haymount.

Q Was this the first time you'd ever put floral wreaths on your lawn or the fence?

A To be honest, it is about the first time they put floral wreaths like that out.

Q Who else—did anyone else go with you to get the wreaths?

A Several people.

Q More than one?

A Yes, sir.

Q Did you ever go to this floral shop and get flowers when they would throw them out?

A All the time.

Q By "all the time," you mean once a week or—

A (Interposing) Any time that they would throw them out. We used to cut through the back there anyway on our way to the pizza shop, so anytime there was fresh flowers thrown out we would take them back home with us.

Q In your mind, was there any connection at all between the MacDonald murders and the funerals, and the fact that you all went to get the funeral wreaths?

A No, sir.

Q You got them because they were available?

[5658] A Right.

Q Now, you said that you wore black, is that correct, or dark purple?

A Yes, sir.

Q Was that unusual for you?

A No, sir.

Q You normally wore that?

A Yes, sir.

Q Did you wear dark purple or black because that MacDonald family had been murdered?

A No, sir.

Q Did you wear dark purple or black because the MacDonald family was being buried at that particular time?

A No, sir.

Q Have you ever been violent before in your life?

A Never.

Q At any time—I believe you said "never," is that correct?

A Yes, sir.

MR. BLACKBURN: Just a second, Your Honor.

(Pause.)

BY MR. BLACKBURN:

Q You know, you have testified on direct [5659] examination this morning that a number of people in Fayetteville and Nashville, Tennessee, talked to you about the MacDonald murders?

A Yes, sir.

Q And you testified whether it was on direct or cross that you did not remember where you were, and that you had been picked up and questioned on a number of occasions.

As a result of not knowing where you were and not having an alibi, and as a further result of being questioned a number of times, did there come a time in your own mind when you began to worry yourself about your involvement in this killing?

A Yes, sir.

Q And is it fair to say that that is the reason that you became concerned, because of what I have just stated?

A It was more the reason of what I was talking about: these people.

Q One of the reasons that you were talking about were these people?

(Witness nods affirmatively.)

Q Because you didn't know where you were in answer to their questions?

A Yes, sir.

[5660] Q Let me hand you what has been marked for identification as Government Exhibit 306, a club. Prior to right now, have you ever seen that club before?

A No, sir.

MR. BLACKBURN: Your Honor, if we could have just one more moment.

(Pause.)

BY MR. BLACKBURN:

Q I think you testified on direct examination you were out in a car with some folks about 4:30 or 5:00 o'clock, is that right?

A Yes, sir.

Q And you don't remember who they were?

A No, sir.

Q Was it unusual for you to come in, in the morning at 4:30 and 5:00 o'clock?

A Not at all.

Q You had done that before?

A All the time.

Q Isn't it true that you might have been at a place called Dunkin' Donuts that morning?

A That is where I was coming in from at that time.

MR. BLACKBURN: Your Honor, at this time we would mark for identification Government Exhibit 952, [5661] which purports to be a photograph.

(Government Exhibit No. 952 was marked for identification.)

BY MR. BLACKBURN:

Q Ms. Stoeckley, let me hand you this and ask you if you can take a look at it. Do you recognize the person?

(Witness nods affirmatively.)

Q Who is it?

A Me.

Q Could you speak up a little louder?

A It is me.

Q Do you know when that photograph was taken?

A I think it was a few weeks after the murder, downtown in the police station.

[5662] MR. BLACKBURN: Your Honor, we would ask to publish this to the jury.

THE COURT: Very well.

(Government Exhibit 952 was received in evidence.)

(Exhibit passed among the jury.)

BY MR. BLACKBURN:

Q Do you know whether or not the photograph I was just showing to you—do you know whether or not that photograph was ever shown to Dr. MacDonald before?

A No, sir; I don't.

Q With respect to the mescaline that you took, I think you said one hit; is that correct?

A Yes, sir.

Q What would one hit do to you?

A Put you on a mild trip.

Q I think you have also testified that you had a lot of drugs in your body that day; is that correct—the 16th?

A Yes, sir.

Q Was that unusual for you to do that?

A No, sir.

Q That was fairly normal; is that correct?

(Witness nods affirmatively.)

Q Isn't it true that during this period of [5663] time in 1970, when you were taking these drugs, that days sort of ran together; is that correct?

A Yes, sir.

Q And at times, you would not know where or remember where you had been or what you had done; is that correct?

A Yes, sir.

Q This is not the first time in your life that you have not ever remembered where you were one night; is it?

A No, sir.

Q Now, I think they brought out that you had a neighbor named Mr. Posey; is that correct?

A Yes, sir.

Q And you testified, I believe, on Direct that you once told him somewhere that he had better tell his wife—

A (Interposing) To keep her door locked. That was a joke.

Q It was a joke? Why did you say that to him if you can recall?

A He was leading me on in this conversation, and I felt like he was trying to make me say things that I didn't want to say, and I just threw that in there.

Q Do you recall ever having a conservation with [5664] Mr. Posey when he offered to give you an alibi for where you were?

A Yes, sir.

Q He did? Did anybody else ever offer to give you an alibi?

A Yes, sir.

Q Did you ever take them up on it?

A No, sir.

Q When you talked to Ms. Zillioux, Mr. Underhill, Mr. Beasley, Mr. Gaddis, Brisentine, Mr. Posey—other than yesterday in Raleigh—is it fair to say that during this period of time in your life that you were still taking drugs?

A Yes, sir.

Q Did Mr. Beasley ever tell you that you had better come up with some kind of story?

A He said it would be to my advantage to try to figure out where I was that night.

Q You never made up any story as to where you were; did you?

A I tried.

Q You don't know who killed the MacDonald family; do you?

A No, sir.

Q Do you know of anybody who you think killed [5665] the MacDonald family?

A No, sir.

Q Now, the floppy hat which you said you had—and you liked your hat because you wore it almost all the time; is that correct?

A Yes, sir.

Q You kept that after the murders; didn't you?

A But I didn't wear it as frequently as I used to.

Q That is because you were being talked to, I suppose?

(witness nods affirmatively.)

Q These words that you testified in 1970—'69 and '70—the words "pig," "acid," "groovy," I think; were those common words at that time?

A Yes, sir.

Q You were not the only person that said those words?

A No, sir.

Q They asked you about Mr. Manson; do you recall that this morning?

A Yes, sir.

Q Did he have any power over you?

A No, sir.

[5666] Q Did anybody have any power like that over you?

A No, sir.

Q I believe you testified that when you got home in your apartment, some painting had been going on; is that correct?

A Yes, sir.

Q Was that an unusual occurrence at your house?

A Nothing was an unusual occurrence in my house.

Q Let me ask you this question, Ms. Stoeckley: is it fair to say that as a result of the MacDonald murders and the questions which you were asked in 1970, and because of the clothing that you owned, that you got a fair amount of attention from folks about this crime?

A Not especially attention—just harassment.

Q With respect to this hobby horse in the photograph, prior to seeing that horse in that photograph, have you ever seen that hobby horse before?

A Plenty of times.

Q When you were talking about a hobby horse being broken this morning—and I guess, maybe yesterday—which one were you referring to?

[5667] A Well, when I first looked at the picture yesterday, I thought it was broken.

Q That is the only significance that has to you?

A That is the only reason I said that.

Q Did it appear to you to be broken in the picture; is that correct?

A Yes, sir.

Q Now, I believe you said that on the 18th of February, 1970, you were detained by the Fayetteville police; is that correct?

A Yes, sir.

Q And you were expected to be interviewed by the CID?

A Yes, sir.

Q They did not show up?

A No, sir.

Q Isn't it true that there did come a time subsequent to that as I believe you testified that the CID did, in fact, interview you?

A Yes, sir.

Q Concerning the MacDonald killings?

A Yes, sir.

Q To your knowledge, were a lot of people being interviewed or questioned?

[5668] A Yes, sir.

Q By the CID or by the Fayetteville police?

A By someone—some law enforcement.

Q By law enforcement?

(Witness nods affirmatively.)

Q I believe you were asked a number of questions concerning the fact that you had moved as a result of the MacDonald killings; is that correct?

A It was one of the reasons; yes.

Q What were some other reasons?

A I had been to North Carolina Memorial and taken methadone and everything and I wanted to move away into another area where I could stay clean.

Q Is it fair to say that you were not particularly anxious to come to North Carolina this week?

A Yes, sir.

Q Prior to leaving North Carolina in 1970, you had cooperated in some ways with the Fayetteville Police Department; is that not correct?

A Yes, sir.

Q And as a result of that cooperation, is it not true to say that even today, you are still fearful for your safety?

A Yes, sir.

[5669] Q Isn't it true that that is the primary reason you did not want to come here and testify?

A It was one of the reasons; yes, sir.

Q You have no reason to believe, do you, that you were standing on a street corner at 4:00 o'clock in the morning on the 17th of February, near Fort Bragg; do you?

A I don't have any reason to believe that; no.

THE COURT: Mr. Blackburn, may I inquire—

MR. BLACKBURN: (Interposing) It would be a few more minutes, Your Honor.

THE COURT: Well, then, it is time for us to go to lunch on our Friday schedule and that is what we will do now. We will come back today at 1:30. You know, we only get one hour on Friday. If you will come back at 1:30. Don't talk about the case. Take a recess until 1:30.

(The proceeding was recessed at 12:32 p.m., to reconvene at 1:30 p.m., this same day.)

[5670] FURTHER PROCEEDINGS 1:30 p.m.

(The following proceedings were held in the presence of the jury and alternates.)

THE COURT: Any further questions of this witness?

MR. BLACKBURN: Yes, Your Honor.

(Whereupon,

HELENA STOECKLEY

the witness on the stand at the time of recess, resumed the stand, and testified further as follows):

CROSS-EXAMINATION 1:31 p.m.

(resumed)

BY MR. BLACKBURN:

Q Ms. Stoeckley, let me hand you Defendant Exhibit Number 86 and 89. With respect to Defendant Exhibit 86—that's a photograph of you I take it?

A Yes, sir.

Q Okay, if you don't mind, would you speak up a little bit louder?

A Yes, sir.

Q Do you know when that photograph was taken or what year it was taken?

A I think it was taken in 1970.

Q In 1970. Now, this drawing that was done [5671] is the Defendant Exhibit 89. Taking that drawing in its totality, is that you?

A No, sir.

Q You didn't sit for that drawing; did you?

A No, sir.

Q You don't know who drew it?

A No, sir.

Q I take it that you don't know then whether or not whoever drew it—this drawing—also had this photograph?

A No, sir.

Q Now, when you came home at about 4:30 or 5:00 o'clock that morning on the 17th, you got out of the car; you recall that?

A Yes, sir.

Q Did you see any blood on your hands?

A No, sir.

Q Did you see any blood on your clothes?

A No, sir.

MR. BLACKBURN: No further questions, Your Honor.

MR. SEGAL: I have a few questions on redirect, Your Honor.

THE COURT: All right, sir.

[5672] REDIRECT EXAMINATION 1:33 p.m.

BY MR. SEGAL:

Q Ms. Stoeckley, do you remember hearing about the funerals of the MacDonald family that were being planned; do you recall that?

A Being planned?

Q Yes; you heard that there was going to be a funeral of the MacDonald family; hadn't you? You heard that in 1970?

A Yes, sir.

Q Didn't you want to attend that funeral?

A I made mention of that fact at one time.

Q Does that mean that you did or not want to go to the funeral of the MacDonald family?

A At one point I did.

Q I can't hear you.

A Yes, sir.

Q And did you talk to some other people about going to the MacDonald funeral?

A Just about getting a way to it or if I would be allowed to go to it or something like that.

Q And was the only reason why you didn't go to the funeral was because you couldn't get anybody to take you out there?

[5673] A No.

Q What was the reason why you didn't go?

A I just changed my mind.

Q Who was it that you talked to about the fact that you wanted to go to the MacDonald funeral?

A I'm not even sure.

Q Was it people that you lived with in the house?

A Probably someone who frequented being at the house quite a bit.

Q What did you mean when you said you weren't sure you would be allowed to go?

A Well, I didn't know if it was for family members or what.

[5674] BY MR. SEGAL:

Q Now, your testimony is that you had never met the MacDonald family prior to February 17, 1970; correct?

A Yes, sir.

MR. BLACKBURN: Your Honor, I would OBJECT.

THE COURT: Yes; I don't see that this—it is what you went into, I think, on direct examination. And on cross-examination, I don't think that there has been anything new brought out about this, has there?

MR. SEGAL: I thought it related to some issue. I have nothing further on that point, Your Honor.

THE COURT: All right.

BY MR. SEGAL:

Q You were asked by the Government's Attorney whether anybody had power over you. Do you recall being asked that?

A Yes, sir.

Q And was your answer—your answer was that nobody had power over you; is that right?

A Yes, sir.

Q In 1969 and 1970, did some drug have power over you when you used it?

A A drug did; yes, sir.

[5675] Q What was the drug that most had power over you when you took it?

A Heroin.

Q What about LSD?

MR. ANDERSON: OBJECTION.

THE COURT: OVERRULED.

BY MR. SEGAL:

Q Yes, Ms. Stoeckley?

A It didn't really have any power—well, I couldn't control it.

Q Can you tell us a little more clearly, when you say you couldn't control it?

A I mean, I couldn't control my actions when I was on it. That is why I discontinued using it.

Q You discontinued—finally discontinued using LSD in what year?

A About '71.

Q And when you discontinued using it, was it because when you used it, you had thoughts that were related to the MacDonald case?

A Not necessarily; no.

Q Not necessarily?

A No.

Q Did you have thoughts relating to the murders of the MacDonald family when you were using LSD between [5676] February 17, 1970, and when you stopped in 1971?

A I don't know what I would be thinking when I was using LSD.

Q Well, what is it, if you can tell us more precisely, that finally made you stop using LSD regularly.

A It wasn't any one thing. I just got tired of the drug taking me.

MR. SEGAL: Bear with me just one second, please.

(Pause.)

MR. SEGAL: I have no further questions of this witness at this time, Your Honor.

MR. BLACKBURN: Your Honor, I would like to have one question, if I might.

THE COURT: All right.

RECROSS-EXAMINATION 1:33 p.m.

BY MR. BLACKBURN:

Q Ms. Stoeckley, have you ever been formally accused or convicted of any crime of violence?

A Of violence?

Q Yes, ma'am.

A No, sir.

MR. BLACKBURN: No further questions.

* * * *

[5688]

TESTIMONY OF WITNESSES ON VOIR DIRE

JANE ZILLIOUX

was called as a witness, duly sworn, and testified as follows:)

[5689] THE COURT: Get right on with it.

MR. SMITH: Your Honor, Mr. Segal and I have divided these witnesses, and Ms. Zillioux is his witness. If I begin that examination, could you permit him to take over.

THE COURT: All right, why don't you just make a statement as to who she is and then go right on into the questioning.

MR. SMITH: All right, Your Honor. This witness is Jane Zillioux. You already have the spelling of her last name. Let me get her address and so forth.

DIRECT EXAMINATION 1:59 p.m.

BY MR. SMITH:

Q Where do you live, Ms. Zillioux?

A Miami, Florida.

Q How long have you lived in Miami?

A Since 1972.

Q Where did you live before you moved to Miami?

THE COURT: She lived across the street from this Stoeckley witness. I said get right on into the thing.

MR. SMITH: I am moving right to it, [5690] Your Honor.

[5690] THE COURT: All right.

BY MR. SMITH:

Q Did you live near Ms. Stoeckley?

A Across the street.

Q In what city was that?

A Nashville, Tennessee.

Q Did you ever talk with Helena?

A Many times.

Q Could you state whether or not you ever talked with Helena any about the MacDonald murders which you have heard had occurred in Fayetteville, North Carolina, in 1970?

A Yes, sir.

Q Do you remember any of the statements she made to you about that?

A Yes; I do.

Q Would you state for the Court the circumstances under which she made the statements and what she said?

A Yes; I will.

Q Okay.

A Helena lived across the street from me in Nashville, Tennessee. She lived in a very small, white house, and the house was—a lot of hippies [5691] lived there. I lived across the street. I was making a living as a freelance artist, and the rent was cheap there. Helena and I both sometimes worked for a small shoe store named Bonnie Shoetique.

It was on the corner of Belmont and Portland Avenue. There was a vacant lot between the hippie house and Bonnie Shoetique. Helena was around the neighborhood. I had known her for several months and I had seen her on many occasions.

On occasion, we had worked together for Bonnie on Saturdays maybe when Bonnie would have a sale—a big shoe sale. And I had—my first meeting came—I had a great big, yellow cat, and he used to wander out of the apartment, and she retrieved him for me one day.

That's how I got to meet her, and I thought she was a runaway. You know, she seemed very young to me. I didn't know how old she was. I never asked her. I just—she looked too young to be away from home.

She was sick. She had hepatitis. On a lot of occasions when I would see her, she would be yellow. Even her eyeballs would be yellow, and one day—I hadn't seen her for a few days and I thought, "Well, I better check on her." So I went over there.

[5692] It was in the evening. I don't know what day it was. I can't remember. It's been that long ago.

BY MR. SEGAL:

Q Can I just ask you one question: do you know approximately what month that would be in?

A Yes, sir; I met Helena first in September, and this was probably before Thanksgiving.

Q 1970?

A Yes, sir.

Q All right, go ahead and tell us about that evening.

A I went to her house to see if she was all right, because I was worried about her. I hadn't seen her for a few days and I didn't know if those hippies were feeding her or not or how she was getting her food.

So, I went over and I knocked on the door and I called and I said, "Helena, are you there?" And she said, "Yes." She came to the door. It took her a few minutes, and, as she opened the door, she turned around, and I followed her into the house.

I went into her room. It was the front room right on the street. And she went over. She was weak and she was shaky and she sat down on the [5693] bed, and I sat down beside of her, and I said—you know—"I haven't seen you for a few days and I was worried about you—you know—are you all right?"

She said, "I've been sick," and I said, "Well, Helena, why don't you go home. You know, why don't you go home to your family and let them take care of you?" And she said, "I can't. I can't ever go home again."

I said, "Well, why?" She said, "Because I was involved in some murders," and she said, "My family don't want me around."

Q What did you say or do when she said she was involved in some murders?

A I didn't say anything. I was just too shocked. You know, I expected a teenage confession like "I hate my mother," you know, or "I'm a runaway." I didn't expect that. I was horrified. I—

Q (Interposing) Did you do or say anything to express your shock?

A I did. I said, "Well, did you do it?" She said—I'm trying to remember the exact words—she said, "I don't know whether I did or not." She said, "I've been a heavy drug user and when you are on drugs, you do funny things." She said, "Drugs make you—when you are on drugs, you do things that [5694] you don't think you did. Things you think you didn't do, you really did." She said, "I don't know." So, I said, "Well, why don't you tell me about it?" She said, "I can't remember."

But she said, "When I came to myself"—she skipped, you know, a whole—whatever it was—I didn't want to hear it anyway. She said, "When I came to myself, I was in the rain," and she said, "It was raining," and she said, "I was terrified."

And when she said "I was terrified," she took her arms like this and she hunched her body over like this and the tears were running down her face and the mucous was dripping from her nose, and she was hysterical, and she was just crying.

I was trying to calm her down. I wanted to get out of there because I didn't know if she was on drugs or not, but I wanted to get out of her apartment because I was—I didn't want to be there. I didn't want to hear that.

So, anyway, I said, "Well, who were you with? She said, "I was with three boys." I said, "Did you know them?" She said, "No, I didn't know them." I said, "Well, why were you with them?" She said, "I was with them for the drugs." She may have said the name of the drug but, if she did, it didn't [5695] mean anything to me because I have never been around drug addicts, and I don't know anything or how they act. I don't know anything about that.

So, anyway, about that time, after I said, "Well, if you knew the names of these people, you could tell." She said, "But I don't know their names." I personally thought she did know their names but she said she didn't.

So, she grabbed hold of my arm—my forearm—and she said, "You won't tell; will you?" I said, "No, I won't." And just as quickly as I could, I got out of there, and I went back to my little apartment, and I thought about it for a few days, and I discussed it with Bonnie Hudgins, the lady who owns Bonnie Shoetique, and I said, "Did you know Helena was involved in some murders?"

She said, "Yes, I knew that." She said—I said, "You know, I don't know much about it. She just told me it was in Carolina," and she said, "It was the Green Beret murders." I said, "Oh." She said, "Did you know Helena was working for the FBI as a narc?" I said, "I had heard rumors, but I am not sure."

[5696] THE WITNESS: (Continuing) So, I called the FBI. I picked up the telephone after about three days, and I called the FBI, because I had thought about it and I was convinced that Helena had had something to do with this; and I thought, "Well, if I call the FBI, I'll have been doing 'my duty.' " You know, I didn't want to live in the neighborhood with her, and I didn't want to be around her, because I didn't know when she might not freak out again.

So when I called the FBI I got the royal "Yes, ma'am, thank you, ma'am; we'll check it out, ma'am," and that was all.

I avoided Helena after that because I didn't want her to know that I had called the FBI, and I felt guilty because I told her I wouldn't tell—but I did call the FBI.

BY MR. SEGAL:

Q Ms. Zillioux, when you called the FBI, did you give the name of the person that you were talking about?

A I told them that her name was Helena and she was involved in those murders in Carolina—the Green Beret murders.

Q Did you give them an address as to where she was?

A Yes, I did.

[5697] Q Now, let me go back if I can for a minute over the conversation. You were describing where Helena was crying, that she was talking about standing in the rain, and she hugged herself?

A Yes.

Q Did she at any time look at her hands or say anything about her hands?

A Oh, well, I'm sorry. I just—I'm not accustomed to speaking in front of people.

When she leaned over and she hugged herself like this, and she was telling me about standing out in front of the rain when she came to herself—she was speaking with her hands.

So she flipped her hands like this, and she said, "So much blood," she said, "So much blood. I couldn't see or think of anything except blood," and she said, "I asked the boys to take me home. I had to get home."

I did ask her at that time, "What did you do with your clothes?" She said, "I got rid of them." I didn't ask her how she got rid of them. She just got rid of them. I didn't ask her any questions, you know.

Q Did she say anything about not wanting any more connection with those clothes?

A Yes, she did.

[5698] Q What were her words, if you can remember?

A I said, "Well, why—you know, why did you get rid of them?" She said, "Because they were the same clothes that the woman in the case was supposed to have been wearing."

Q Now, did she say who were the persons murdered either not by name or—

A (Interposing) She said a woman and two small children.

Q Did she ever mention something about her wig?

A Yes, she had—she told me she had on her blond wig and her white boots. I know that they were white plastic-leather boots because before that when we had been working in Bonnie's Shoetique, she pointed the boots out to me—a pair that was in the store; and she said, "I had a pair of boots like these, and I loved them, but I had to get rid of them."

Q Did she say anything about whether she was wearing the wig while she was standing out there in the rain?

A Yes, she did, because she didn't know—it was—from her account it was raining heavily; and she was afraid her wig would be ruined, and she was worried about the wet wig.

[5699] Q Now, you said that during the time that she was telling you these things she was crying, is that right?

A She was hysterical, and then she would pause, and then she would get herself under control; and then she would lose control again. It was very bad for her and me too. It was heavy. It—you know, it was hard for me to handle.

Q And when you say "lose control," what do you mean—

A (Interposing) Sobbing, crying, you know—holding herself, grasping her arms, her stomach, you know, tears coming down her face—blubbering, incoherent.

Q What was her—I'm sorry; are you through?

A That's all right.

Q What was her condition when you left; I mean what was she doing?

A She was laying on the bed crying when I left. There were people who came in. This was a hippie house, and the bed was like this. The front door was where the judge was sitting, and there was another door directly over at this side.

The two of us were sitting on the bed, and on at least two occasions that I know of hippies came [5700] to the door and she screamed at them, "Get out of here, get out of here." And she was screaming, you know, for them to get out, you know.

Q In other words, she did see other people when they came in and she reacted to their being there?

A Yes, sir.

MR. SEGAL: I have nothing further on the witness at this time. That is the offer we make in this regard. [5701] MR. BLACKBURN: Let me ask just a small number of questions, Your Honor.

CROSS-EXAMINATION 2:12 p.m.

BY MR. BLACKBURN:

Q Ms. Zillioux, I think you stated that she was almost incoherent while she was talking to you?

A At times periodically.

Q When you went in to see her at first, what was her condition?

A Shaky. She was sick with hepatitis.

Q You don't know whether or not she was taking any drugs at that time?

A I am sorry, sir. I have never been around people on drugs, and I have no idea what they are like. Even today, I couldn't tell you. If you were on drugs, I couldn't say to anyone that you were on drugs because I really don't know.

Q She said that she was involved with the murders; did she?

A Yes, sir. She said, "I was involved in some murders and my family don't want me around."

Q Did she actually say that she killed somebody or just say that she was involved?

A She was involved.

[5702] Q She did not define what the term "involved" meant?

A No, sir, and I didn't ask.

Q You said something—I am not sure I got the full thrust of this, but she said that drugs make you think—

A (Interposing) Drugs do funny things to you.

Q Tell that very slowly.

A Okay. I may have gotten my words mixed up. "Drugs do funny things to you. When you are on drugs, things happen you think didn't. Other things that did happen, you think didn't happen that you think did." It is kind of a tongue twister, but those were her exact words, you know.

Q You may have answered this, but let me ask it anyway with respect to that remark: did she ever say anything like, "Sometimes drugs make you think that you did something—

A (Interposing) That was not what she said.

Q She never said that?

A No, sir.

MR. BLACKBURN: No further questions, Your Honor.

MR. SEGAL: Thank you, Ms. Zillioux. [5703] You may step down.

THE COURT: Did I understand you to say that she stated that she did not know whether she committed a crime or not?

THE WITNESS: Well, this morning in the Courtroom—

THE COURT: (Interposing) Listen, I want to know what she told you—did I get this down right—"I don't know whether I did it or not," is that what you said?

THE WITNESS: Yes, sir.

THE COURT: That is what she said to you?

THE WITNESS: Yes, sir.

THE COURT: Call your next witness.

(Witness excused.)

MR. SMITH: Jim Gaddis is the next witness we would call.

(Whereupon,

JAMES T. GADDIS

was called as a witness, duly sworn, and testified as follows:)

MR. SMITH: Mr. Gaddis, take the witness stand, please, sir.

THE COURT: Just go ahead and tell us [5704] who he is and then ask the questions, will you, please?

MR. SMITH: Your Honor, this witness is named Jim Gaddis. He is a police officer in Nashville, Tennessee.

DIRECT EXAMINATION 2:13 p.m.

BY MR. SMITH:

Q Mr. Gaddis, do you know Helena Stoeckley?

A Yes, sir; I do.

Q Did she ever make any statements to you about any murders which took place in Fayetteville, North Carolina, in February, 1970?

A Yes, sir; she did.

Q If you will move as quickly as you can, skip any of the preliminaries, and tell the Court exactly as you recall what she told you?

A I talked with her on several occasions about the murders. She said that she thought she had been there when the murders took place. The night that the murders took place, she had tripped out on some mescaline and some LSD and she remembered being there. On other occasions, she would say that she knew who had done it, but that she wasn't there. She would get very depressed when she talked about it. In fact, on several occasions, she would become so depressed that we could [5705] not even talk with her. It led me to believe that she did talk—it led me to believe that she was there and had been there.

Q Mr. Gaddis, did she seek you out or did you seek her out?

A She sought me out.

Q Would you tell the Court how that happened?

A I had been working a special assignment hunting for a person who was assaulting women in the area where she lived. I had driven by her house one night and she stopped me. After talking several minutes with her, she said that she had some information she wanted to give me concerning some drugs that were being used in the area and also about a police officer on our department who was selling drugs to children.

[5706] BY MR. SMITH:

Q How did she get into the subject of the MacDonald murders?

A After about two or three days of talking with her about the police officer and the other drugs being used in the area, she asked me if I could find out if she was still wanted for questioning in the MacDonald murders, and explained to me that she thought she was, but she wasn't sure, and told me who to contact, which I did.

Q Did she then give you specific names?

A She gave me the names of a boy named Greg. She did not know his last name at the time—but also a gentlemen named Bruce Fowler whom she had been with the night that she took the mescaline and the LSD, and who had a blue Ford Mustang.

Q Did she ever make any further description to you about what occurred, giving you any specific examples or any other specific information?

A The only information that she related to me was that she had been at the scene. She felt she had been there, and that the clothes she wore while she was in Nashville fit the exact description of the clothes of the female that was involved in the murders themselves.

Q When you talked with her, Mr. Gaddis, in your opinion, was she under the influence of any narcotic [5707] drugs?

A At times she was and at times she wasn't. I knew that she was dealing some. I knew that she was using heroin at the time.

Q During the times that she gave you information about the MacDonald case, was it your opinion she was under the influence of narcotic drugs?

A She gave me information on several occasions. At times, she was under the influence. Most of the time when she gave me the information about the MacDonald murders, she was not.

MR. SMITH: You may examine.

CROSS-EXAMINATION 2:18 p.m.

BY MR. BLACKBURN:

Q Mr. Gaddis, is it true that Ms. Stoeckley has told you that on the 17th of February, she took LSD but that it had no effect on her?

A That is correct.

Q Is it not true that she has told you at one time that she remembers nothing about that evening, but that she does remember coming home in a blue automobile?

A That is correct also.

Q Isn't it true that at one time, since you have met her, she said that she cannot remember who she [5708] was with or where she went?

A That is correct also.

Q And she has told you, I believe, that at one time she knew who was involved, but did not give you any names?

A That is correct also.

Q And at another time, she said she only had suspicions of who was involved?

A That's true.

Q Isn't it true that at other times she said Dr. MacDonald did the killings?

A That is true also.

Q In your opinion, has she ever simply said things to you but refused to explain them any further?

A Yes, sir; she has.

Q Has she ever described the inside of the MacDonald apartment to you?

A No, sir; she didn't.

Q Now, on the 23rd of April, 1971, did you have occasion to see her?

A Yes, sir.

Q At that time, did she say to you that she was not involved, but that she knew who was?

A Yes, sir.

Q And that on the same day, she said that she [5709] was there, and she witnessed the murders?

A That is correct, but she had not been involved in the actual killings themselves.

Q Right; and she has given you the name of at least two people, but no others?

A That is correct.

Q Has she ever said anything to you about any of the weapons that were used?

A No, sir.

Q Anything about candles?

A No, sir.

MR. BLACKBURN: Your Honor, that concludes our questioning.

THE COURT: All right. Call your next witness.

MR. SEGAL: Mr. Underhill, please.

THE COURT: While he is coming, let me ask Mr. Gaddis just one question. On the basis of what this girl told you—these murders—had these murders happened in Nashville, would you have issued or signed a warrant for her?

THE WITNESS: I am not sure, sir. I have a feeling —like I say, I would have tried to have her indicted.

THE COURT: You would have investigated [5710] further?

THE WITNESS: I would have investigated further, and I would have indicted her; yes, sir.

THE COURT: All right; call your next.

[5711] (Whereupon,

CHARLES EDWARD UNDERHILL

was called as a witness, duly sworn, and testified as follows:)

DIRECT EXAMINATION 2:20 p.m.

BY MR. SEGAL:

Q Mr. Underhill, were you living in Nashville in late 1970?

A Yes, I was.

Q Did you know Bonnie Hudgins, a lady now known as Jane Zillioux, and Helena Stoeckley?

A Yes, sir; I did.

Q Did you have an occasion in late 1970, to go to Helena Stoeckley's apartment where she was living?

A Yes, I did.

Q Do you recall what month that was?

A It was in the month of December.

Q What happened when you got to the door of her apartment?

A Well, I just walked up and knocked on the door. After I had knocked—of course, this was like in the same second, really, or two seconds, and I heard someone crying—more or less, just into a hysterical sob instead of a normal cry. I asked, "Helena?" The [5712] voice that came back was "Get away."

I asked again—I said, "Helena, is that you in there crying?" She said, "Get away. I don't want to see you or nobody," so I said, "Well, I will go down and get Bonnie and she can come down here and maybe straighten you out."

She said, "Who is it?" I said, "It is Underhill." She said, "Red?" I said, "That is right. I am going to get Bonnie," which the lady had been working with her and helping her along and so forth. Then, she said, "Wait a minute. Don't go get Bonnie. I will let you in," which she came to the door and unlocked the door and I walked in—the first and only time I have even been in her apartment.

I asked her—I said, "What in the world is wrong with you carrying on like this—something happen to you? What is wrong? Tell me." She just started sobbing worse and just terrible. The next thing that came from her mouth was, "They killed her and the two children."

I said, "What is wrong with you, you goofy fool, are you on dope or something?"

BY MR. SEGAL:

Q What did she say?

A And then, at that minute, she reversed it for [5713] some reason—why, I don't know—and said, "They killed," and sobbing just hysterically at the same time getting these words out, "they killed the two children and her," so it is stated one way and then reversed. I said, "Ah, you are just as goofy as hell. Something is wrong with you, so I am going to get Bonnie right now, and Jane, and see if they can't take you somewhere or do something for you or help you or do something." She begged me not to go get them, so I just left and went across the street where Jane was living and told Jane—I said, "She is over there crying and screaming and carrying on. You better go check on her or something." That is the end of that situation.

Q All right, did you ever find out from her about what woman and two children she was talking about?

A Well, I never did ask her as to names—what could be the names of these two people, just where they lived, or whatever. I never did ask her those questions.

Q Did she indicate where they took place?

A Only North Carolina is the only thing she said—did not name a city—just North Carolina.

MR. SEGAL: Cross-examine?

CROSS-EXAMINATION 2:24 p.m.

BY MR. BLACKBURN:

[5714] Q Mr. Underhill, I believe you testified that she was crying hysterically; is that correct, when you saw her?

A Right. You are correct.

Q Do you know whether or not she was on drugs or anything like that?

A Well, I don't fool with drugs. I wouldn't give you a dollar if this room were full of them. I don't fool around with drunkards, liars, and dopeheads, and stuff of this nature; so naturally, whether she could be on drugs or not, I would not know because I am not qualified to know.

[5715] BY MR. BLACKBURN:

Q She was not in a calm state of mind?

A Well, whatever had got her in the state of crying or whatever had built—got her built up to get in this state, I don't know.

Q Is it correct to say that what she told you was that, "They killed her and the two children," and that, "They killed the two children and her," is that correct?

A That is correct.

Q And that this took place in North Carolina?

A Right.

MR. BLACKBURN: No further questions.

MR. SEGAL: Thank you, Mr. Underhill.

(Witness excused.)

MR. SMITH: Robert A. Brisentine. Your Honor, while Mr. Brisentine is coming in, let me state for the court that his name is Robert A. Brisentine, Jr., and he lives on Chesney Lane in Bowie, Maryland.

(Whereupon,

ROBERT A. BRISENTINE, JR.

was called as a witness, duly sworn, and testified as follows:)

DIRECT EXAMINATION 2:28 p.m.

[5716] BY MR. SMITH:

Q Mr. Brisentine, have you ever interviewed Helena Stoeckley?

A I have, sir.

Q Do you recall about when that was?

A Yes.

Q When was it?

A On the 23rd and 24th of April, 1971, sir.

Q Where were you when you interviewed her?

A In Nashville, Tennessee, sir.

Q Did you retain any notes from that interview?

A I did, sir.

Q Do those notes refresh your recollection as to statements she made to you?

A Yes, sir, they would.

Q Do you have any of the notes with you on the witness stand?

A Yes, sir.

Q Would it help you to refer to those notes—

A (Interposing) It would, sir.

Q —in stating to the court what she said to you?

A It would, sir.

Q If you will use those notes to refresh your [5717] recollection, state to the court what Helena Stoeckley told you, if anything, relating to any murders that took place in Fayetteville, North Carolina, in February of 1970?

A Helena Stoeckley—I interviewed her on the 23rd for a period of four hours and 20 minutes, sir; and on the 24th of April—23rd of April for four hours and 20 minutes, and the 24th of April for six hours and six minutes.

She stated on the 23rd, during that particular interview, that due to a mental block—and that is the terms that Ms. Stoeckley used—she does not remember her activities or whereabouts between 00—well, that's 12:30 a.m., to 4:00 o'clock a.m. on the 17th of February; that during a period of three to four months subsequent to the homicides in the MacDonald residence, she was convinced that she participated in the murder of Mrs. MacDonald and her two children; that she presently is of the opinion that she personally did not actively participate in these homicides, but may have been physically present at the time of the murders; that prior to the homicide she had heard that the hippie element was angry with Captain MacDonald as he would not treat them by prescribing methadone for their addiction to drugs.

[5718] Ms. Stoeckley later retracted this statement and said that she only thinks she heard of Captain MacDonald before the murders; that she had never been to Captain MacDonald's residence prior to the homicide; that prior to the homicide she had visited Castle Drive, Fort Bragg, North Carolina, for the purpose of delivering illicit drugs to an officer she knows only as Bob; that approximately 24—12:00 p.m.—12:00 o'clock p.m., 16th of February, 1970, she and a man named Greg Mitchell consumed LSD and mescaline; that she was using all types of drugs—opiates, heroin, marihuana, depressants, stimulants, and hallucinogenics prior to and immediately following the homicides.

That during April, 1970, she was admitted to the University of North Carolina hospital for hepatitis and drug addiction; that as a result of excessive drug use during the time of the homicides, she was not always oriented as regards time, dates, and surroundings; that since the deaths of Mrs. MacDonald and her children, she, Helena Stoeckley, has suffered nightmares whenever she sleeps, and that due to these frightening dreams she is afraid to sleep, causing insomnia.

That her original dreams portrayed the word "pig" in blood on the headboard of Mrs. MacDonald's [5719] bed.

Ms. Stoeckley described her dream by printing the word "pig" horizontally on the left side of a drawn picture of a bed headboard. She asserted that in her dreams the word "pig" is always on the left side of the headboard.

[5720] THE WITNESS: (Continuing) That during the past three or four months her dream places her on the couch in Captain MacDonald's living room and that Captain MacDonald is pointing at her with one hand while holding an ice pick that is dripping blood with the other hand.

That during February, 1970, she possessed and occasionally wore a pair of white boots, a floppy type, white hat, and a blond wig. That following the homicide, she discarded the boots, wig, and hat. That about the same time as the homicide, she stole some floral wreaths from the florist in Fayetteville, North Carolina, and displayed them in the front of her residence.

That one of the wreaths had the word "Mother" written on its ribbon while one or more of the other wreaths had the word "Sister" written on them. That immediately following the homicide, she wore black clothing and the day of the funeral of Mrs. MacDonald and her children, she—Ms. Stoeckley—meditated and wore black clothing.

That she desired to attend the MacDonald funerals but did not attend as none of her friends would accompany her. That she went into hiding to evade police arrest subsequent to the homicides and [5721] considered fleeing from Fayetteville, North Carolina. That she knew the identity of the persons who killed Mrs. MacDonald and her children. That if the Army would give her immunity from prosecution, she would furnish the identity of those offenders who committed the murder and explain the circumstances surrounding the homicides.

BY MR. SMITH:

Q That concludes the gist of the statement she made to you; is that correct, Mr. Brisentine?

A On the 23rd; yes, sir. That's not the 24th.

Q All right, now, did she make a statement to you on the 24th?

A She did.

Q What did she say?

A On the 24th Ms. Stoeckley related she had been incorrect in her statements and had and I quote "talked too much" and that she only suspected some people of committing the homicides. At this time, Ms. Stoeckley stated that she suspected Don Harris, a Caucasian male, who told her after the homicide that he must leave Fayetteville, North Carolina, as he could not find an alibi for the time of the murders; Bruce Fowler, the owner of a blue [5722] Mustang automobile in which she, Ms. Stoeckley, was a passenger or a driver on the night of the homicides; Janet Fowler, wife of Bruce Fowler and who was employed as a go-go dancer in Fayetteville, North Carolina, at the time of the homicides.

I should digress here, sir. I later learned this lady's name was Janice Fowler—not Janet Fowler.

Q All right.

A Joe Kelley, a Negro soldier who was assigned to a medical holding detachment at Womack Army Hospital, Fort Bragg, North Carolina, at the time of the homicides, and a Negro male she knew only as "Eddie" who introduced her—Ms. Stoeckley—to heroin.

At one time during the interview on 24 April, Ms. Stoeckley asserted that she had been lying when she admitted knowing who committed the homicides and stated that Captain MacDonald had killed his family. Further, that her rationale was based on the fact that four hippies could not have entered Captain MacDonald's home without being observed by neighbors or causing dogs to bark.

Ms. Stoeckley further explained that it had been drizzling rain during the night but that it [5723] did not start to rain hard until after the homicides. On inquiry from me, Ms. Stoeckley explained, "I've already said too much." Later, during the interview, Ms. Stoeckley again repeated her previous statement about saying she suspected hippie-type individuals of the crime.

Q Does that conclude her statements to you?

A Basically. That is all the notes that I took during the statement.

MR. SMITH: You may examine.

[5724] CROSS-EXAMINATION 2:35 p.m.

BY MR. MURTAGH:

Q Mr. Brisentine, were you ever in the Army?

A Yes, sir.

Q How long, please?

A I was on military active duty for 22 years, sir.

Q During the course of your active duty in the military and subsequent to that time, have you observed many people under the influence of narcotics?

A Yes, sir.

Q Would it be accurate to say that you would recognize an addict or a junkie when you see one?

A I would say in a lot of instances, if not in most instances, if an individual is on drugs at the time, I probably could recognize it as being some type of intoxicant.

Q Would you describe your observation, sir, if any, of Ms. Stoeckley on the 23rd of April and the 24th of April?

A On the 23rd of April, sir, Ms. Stoeckley, in my opinion, was under the influence of narcotics.

Q And on the 24th of April, which is, I believe you testified, the time at which she retracted her previous statement?

[5725] A Yes, sir. Well, Ms. Stoeckley would retract, and then she would again say, yes; that she was there. "No; I was not there." "I am involved." "I am not involved." Basically, though, generally speaking, on the 23rd she contended that she was involved in these homicides. On the 24th she did change originally, but then later said she did know something about it.

Q Would it be accurate to say that the overall situation would be that she was all over the lot, whether she was involved or not involved?

A She certainly changed her statements during the two days; yes, sir.

Q Did she ramble at any time?

A On the 23rd, she rambled some; on the 24th, she was in much better mental condition.

Q Did she seem, at any time, out of touch with reality?

A She was very nervous, somewhat depressed occasionally, on the 23rd. And she made statements that would indicate that she may not be completely oriented at that time on the 23rd.

Q Let me ask you, have you ever been at the crime scene?

A Yes, sir.

Q Was that prior to interviewing Ms. Stoeckley?

[5726] A Yes; that was a year prior, in April of '70, I believe, sir.

Q Okay; would it be accurate to say that you were generally familiar with this investigation?

A I was generally familiar with the crime scene and I had a general familiarization of the investigation. I did not know all aspects of the investigation.

Q Okay; and I believe you testified that she described the letters as "pig" on the headboard; is that correct?

A She drew it on the headboard. Well, she drew it on a photograph of the headboard.

Q Had you seen that headboard previously?

A No, sir; I had not seen the headboard. I had seen a photograph of the headboard.

Q Let me ask you, do you know which way the letters "pig" go on the headboard?

MR. SEGAL: Your Honor, I don't think this goes to the question of voir dire. It is really general cross.

THE COURT: I rather think it does. I will OVERRULE this, if it is an objection.

MR. SEGAL: All right, sir.

BY MR. MURTAGH:

Q On the actual headboard, which I believe you [5727] saw a photograph of, which way?

A Horizontal, if I recall, sir—I mean, vertical.

Q Which way did Ms. Stoeckley do it?

A Horizontal.

Q Do you know whether the fact that the letters "pig" were written in blood on the headboard had ever appeared in any of the Fayetteville papers?

A I can't tell you, sir, what was in the Fayetteville paper.

Q Would you agree, if I were to suggest to you that it was published in the paper?

MR. SMITH: OBJECTION. How could he possibly know?

THE COURT: OVERRULED. I don't think the question is going to prove anything, but this is voir dire. There is no jury here.

MR. SMITH: The basis of my objection is the previous answer made it impossible for him to know.

BY MR. MURTAGH:

Q Now, in her statement in which she said she had a dream or nightmare about being in the living room, who was holding the ice pick?

A Captain MacDonald.

[5728] Q Captain MacDonald was holding it? Okay; was she able to describe the house to you in any way—the interior of the house?

A No; that was part of—that was the reason I was trying to get some information, to find out what she knew about the interior of the house. That is why I asked these questions.

[5729] BY MR. MURTAGH:

Q Did she tell you anything that wasn't common knowledge, if you know, sir?

A She did not tell me anything that I didn't know, sir.

Q Did she tell you anything which indicated insider's knowledge of the crime scene?

A No, other than she knew about the blood on the bed. I can't recall anything else that she told me.

Q All right, now, she named some individuals; did she not?

A Yes, sir.

Q Did you conduct an investigation or are you aware of the results of the investigation, if any, of those individuals?

A Yes, sir. I am aware of the interviews and some portions of investigation of the other individuals, and I personally interviewed some of them.

Q If you know, sir, other than Helena Stoeckley's statement, is there anything that ties those people to the commission of this crime, whether they were fingerprinted or anything like that?

A I would have to answer those about each one, sir. I cannot answer that in one. As to the names that Ms. Stoeckley—

* * * *

[5735] THE COURT: The objection is OVERRULED.

THE WITNESS: Don Harris—I can't answer as relates to him as to what the investigation effort was pursued. Bruce Fowler—from what I could determine during my part of the investigation was not involved. Janice Fowler—I couldn't determine during any part of my investigation that she was involved. Joe Kelley—I do not know about or the individual that Ms. Stoeckley identified as "Eddie" I do not know about.

BY MR. MURTAGH:

Q Mr. Brisentine, would it be accurate to say that all of Helena's statements that she made to you at various times pertained to her state of mind or her beliefs?

A I'm sorry, sir. I didn't hear your last part.

Q In other words, would it be accurate to say that all of Helena's statements—the "I did it; I didn't do it"—wouldn't this pertain to her state of mind or her belief?

MR. SEGAL: That's OBJECTED to. It goes to statements of fact that she has testified.

[5736] THE COURT: OVERRULED. Do you understand the question?

THE WITNESS: Yes, I understand the question.

THE COURT: Answer it, please.

THE WITNESS: It could be a state of mind, of course.

MR. MURTAGH: No further questions.

MR. SMITH: I would like to ask one additional one if I may.

THE COURT: All right.

REDIRECT EXAMINATION 2:47 p.m.

BY MR. SMITH:

Q As a matter of fact, Mr. Brisentine, you were very impressed with the sincerity of Helena Stoeckley with you; weren't you?

A I was impressed with the fact that she made such admissions; yes.

Q And based on everything that you could observe about it, you had to figure that she was making those statements to you with some conviction; didn't you?

A That's true.

MR. SMITH: All right. No further [5737] questions.

THE COURT: That is that she honestly believed that these things were true.

THE WITNESS: I would have to say, Your Honor, that she honestly believed in her mind that what she was telling me was true.

MR. MURTAGH: One question.

RECROSS-EXAMINATION 2:48 p.m.

BY MR. MURTAGH:

Q Would that be all of it? I mean, "I did it; I didn't do it."

A No; I would have to say, based on my investigation, that when she said she was physically present that she thought in her mind that she was.

Q Do you know for a fact whether she was present?
A No, sir.

MR. SMITH: OBJECTION.

THE COURT: I believe there was an objection. SUSTAINED. Call your next witness. And incidentally, of the five that you said you were going to call, he makes the fourth one in my count.

MR. SEGAL: There are two more. There are six then.

[5738] THE COURT: Okay, in this league, five means six.

THE WITNESS: I am excused, Your Honor?

THE COURT: As far as I am concerned, you are.

(Witness excused.)

(Whereupon,

P. E. BEASLEY

was called as a witness, duly sworn, and testified as follows:)

DIRECT EXAMINATION 2:49 p.m.

BY MR. SMITH:

Q Your name, please, sir.
A P. E. Beasley.
Q Where do you live?
A Fayetteville.
Q What do you do, Mr. Beasley?
A I'm retired.
Q What did you do before you retired?
A I was a Fayetteville police detective.

[5739] BY MR. SMITH:

Q During the period of time in which you were a Fayetteville police detective, would you say whether or not you ever knew Helena Stoeckley?
A Yes; I did.

Q When did you first meet her?

A 1968.

Q Could you state whether or not, during the period of time in which you knew Helena Stoeckley, you ever had conversations with her about the MacDonald murders—what took place in February of 1970?

A Yes; I did.

Q Do you recall on about what date it was when you had your first conversation with Helena about that?

A On the morning of February 17th, I believe.

Q All right; and where were you when you had that conversation?

A In the driveway of an apartment where she was going into.

Q Mr. Beasley, would you tell the Court in your own words what you recall about that conversation?

A I had gotten off work prior to the incident that we are discussing and went home and went to bed about 2:00 o'clock that morning. I was called at home at approximately 7:30 or 8:00 o'clock and advised of this [5740] and gave descriptions of the suspects that was given out.

I got dressed and went downtown, or to the office and pulled out my notes and got some information that Ms. Stoeckley had given me on a trailer near Fort Bragg.

Q Let me interrupt you just for a moment, if I may, Mr. Beasley. I take it you had had many conversations with Ms. Stoeckley prior to that day?

A Yes; I did.

Q Had you found her to be a reliable person?

A The most reliable informant I ever had.

Q All right; you may proceed.

A Then, after I received descriptions of the suspects, I went to this trailer I knew she had been living at, and there was no one there. So I proceeded to look for her that day, and I couldn't find her or anyone else—the ones I was looking for.

So I went back home and went to bed. During the time I was at home, some other officers got my warrant and went back to the trailer, but we had searched this trailer prior to this—and recovered a large amount of drugs that she had told us was there, and they were there. We confiscated these drugs and we returned to the police station. I signed a warrant—I believe I signed [5741] it, and they went back later that afternoon and arrested one man.

And when I went to work, I found out that this had been done, so I went back to the apartment house where Helena was supposed to have been living. There was no one there, so I staked the place out, I guess, until 2:30 or 3:00 that morning.

She drove into the driveway with a group of people in—I believe it was an old convertible, Plymouth-looking car.

Q All right; Mr. Beasley, at this time it would be the 18th of February?

A Yes, sir; I believe it would.

Q All right; go ahead. What happened?

A I was driving an unmarked car and I was dressed in dungarees and leather jacket. I walked up behind the car and I called her to me, and as I called her she came towards me and the other subjects in the car also came toward me.

She turned around and told them it would be all right to sit down. So I took her to my car and asked her had she heard about this incident at Fort Bragg. She said she had, and I said, "Well, Helena, according to the information we've got, you and these people you are with fit the description that was given out." I said, "Now, [5742] I am going to ask you straight out, I know you and you know me. I want to ask you to tell me the truth."

She backed off and hung her head. She says, "In my mind, it seems that I saw this thing happen"; but she says, "I was heavy on mescaline." And she would not commit herself any further.

Q All right; what happened next?

A I got names of the other people that was in the car with her. I called CID at Fort Bragg and told them that I had some suspects in custody that fit the description—would the police come down?

I believe that was about 2:30 and at 4:30, or almost daylight, nobody had ever come or either returned my call. I released these people and let them go.

Q Did you ever see any of them again, other than Helena Stockeley?

A Never.

Q Did you ever see Helena Stoeckley again?

A Yes; I did.

[5743] BY MR. SMITH:

Q When did you next see her?

A I can't recall the time, but it wasn't long after that. Later, I went up to her apartment, tried to locate her again, and I believe the last time I saw her there was a bunch of wreaths out in the front yard, and I believe there was also one hanging on the front door.

Q Did you ever talk with Helena about that?

A Yes; I did.

Q What did she say?

A She said that she was in mourning.

Q In mourning?

A Yes, sir.

Q What was she in mourning about?

A In reference to the MacDonald murders.

Q Did she tell she was in mourning about the MacDonald murders?

A Yes; she did, and she was wearing black, and I might add that she would not—I was really wanting some information really—and she would not even talk to me about it.

Q When did you next talk to Helena?

A I can't remember, Mr. Smith. I don't know.

[5744] Q Did you ever talk with her out in Nashville?

A Oh, yeah, yeah. That was a year later—about a year later.

Q Why did you go out to Nashville to see her?

A An agent—I believe his name was Mr. Mahon—from Washington, D.C., came around the police station and contacted me; asked me about the situation and, of course, I told him what I knew and he asked me would I assist him in locating her and I said, "Sure, be glad to."

Q When you were out in Nashville talking to Helena, did you talk with her any about the MacDonald murder?

A Yes; I did.

Q Do you remember anything she told you out there?

A Basically the same thing she told me in Fayetteville.

Q Now, I take it that during the time you knew Helena in 1969-1970, you knew that she was a drug user?

A Yes, I did.

Q Nevertheless, did you find you could rely upon Helena to tell you the truth?

[5745] A Yes, sir.

Q When Helena told you she was going to be somewhere, would she be there?

A She would always be there. She was never late. She was always on time. If anything, she was early.

Q When Helena told you that you could find drugs at a location, did you find the drugs there?

A I found the drugs there.

Q Mr. Beasley, was that always the case?

A Always.

Q Did you feel that Helena was under the influence of drugs at times when she gave you information?

A At times I had suspicions. I didn't know for sure, but I did have suspicions that she might be.

Q Even under those circumstances when you had the feeling she was under the influence of drugs, did you find you could rely upon her—

A (Interposing) Yes, sir.

Q —to tell you the truth?

A Yes, sir.

MR. SMITH: You may examine.

[5746] CROSS-EXAMINATION 2:58 p.m.

BY MR. BLACKBURN:

Q Mr. Beasley, when you were in Nashville, Tennessee, do you recall making a statement dated March the 1st, 1971, concerning this?

A Any statements—I don't recall. It has been a long time. The files on this case have been misplaced. I have no idea where they are. I have all my statements in this folder, and if I could refer to them, I could tell you that.

Q I'll be happy to show you what I am talking about.

A All right, sir.

Q It may speed it up. Take a look at this, Mr. Beasley, and see if you recognize it. Do you recognize this as your statement?

A Yeah.

MR. BLACKBURN: For the record, Your Honor, he has identified a four-page statement.

BY MR. BLACKBURN:

Q Is that your signature?

A This is my signature.

Q Could you speak up, sir? We want to hear.

A That is my signature there.

[5747] Q Directing your attention, if you would, sir, to the second paragraph on the first page of a statement dated March the 1st, 1971, if you would read right there that sentence, sir?

A "She stated that she did not remember anything that happened on the night of the murders except that she did remember getting into a blue car she thought was a Mustang and it belonged to one Bruce Fowler."

Q Now, if you would read the sentence—let me see—the same statement, the third page, the second paragraph, the sentence which I have underlined, sir.

A "She again told me she had no knowledge of this night after 12:30 a.m. and that she does not know for sure what happened."

Q On the last page, the last sentence, sir.

A "It is my conviction that she is involved in the MacDonald case or at least she thinks she is or that she is doing this just to get all the attention she possibly can."

Q Now, I believe that you stated on the 17th or 18th, when you picked her up, the CID did [5748] not come or return the call, is that correct?

A No, sir.

Q Do you know whether or not the CID ever subsequently interviewed her?

A No; I didn't.

[5749] BY MR. BLACKBURN:

Q With respect to your first interview with Helena Stoeckley on the evening of the 17th of February, do you recall making a statement that, "Ms. Stoeckley did not indicate involvement in the murders at that time, nor did she indicate that she could recall her activities on that day in question?

A I don't recall.

Q You don't recall making that statement?

A No, sir.

Q Do you recall ever making the statement that during the investigation of the MacDonald murders, she was interviewed by the FBI and the CID and nothing concrete was established regarding her involvement?

A I don't know that either.

MR. BLACKBURN: No further questions.

MR. SMITH: May I ask one additional question?

THE COURT: Yes, sir.

REDIRECT EXAMINATION 3:02 p.m.

BY MR. SMITH:

Q On page 2, I believe—on the material that has been given you, Mr. Beasley—if you will turn to the second page—do you have any material up there now?

[5750] A I don't have anything.

Q Let me hand it to you.

THE COURT: Just read it to him.

BY MR. SMITH:

Q Mr. Beasley, do you recall making this statement or writing this statement down?

". . . After the night of the MacDonald incident I picked Helena Stoeckley up for questioning. I talked with her in reference to the case. She was in a joyful mood and joked about her ice pick."

Do you remember that?

A Your Honor—I mean Mr. Smith—she said so many —if I put it down there, she said it, because I didn't make it up.

Q All right, then; you do recall writing the material down in this statement that you have been furnished?

A Yes, sir; I wrote everything down that I could get.

Q Do you recall that what you wrote down in this statement was true at the time you wrote it down?

A Yes, sir.

MR. SMITH: That is all the questions we have.

[5751] MR. SEGAL: Thank you, Mr. Beasley. You may step down.

(Witness excused.)

THE COURT: Call your fifth witness for the second time.

(Whereupon,

WILLIAM EDWARD POSEY

was called as a witness, duly sworn, and testified as follows:

DIRECT EXAMINATION 3:03 p.m.

BY MR. SEGAL:

Q Mr. Posey, did you know Helena Stoeckley in 1970?

A Yes; I did.

Q Where did you live and where did she live?

A I lived right next door to her.

Q What street was that?

A Clark.

Q Do you remember the evening or early morning hours of February 17, 1970?

A Yes; I do.

Q Anything unusual happen that morning that attracted your attention?

A Well, I had got up to go to the rest room [5752] somewhere around 4:00 o'clock, and I heard a car whip into the driveway next door, and a lot of laughter and stuff going on, and I walked to the door to see what was going on.

Two of the girls—there was three of them that lived together in the apartment—two of the girls were inside painting the apartment. You know, they had the front door there, and Helena was coming from the car, you know—headed towards the apartment. And the car backed out.

Q Okay; you say two girls were in the apartment?

A Yeah.

Q Helena was not one of those girls?

A No; she was coming from the car.

Q Do you know what kind of car that was?

A I know it was a Mustang, you know.

Q Do you remember what color it was?

A It was blue.

Q Let me show you a catalogue piece which has been previously marked as Defendant Exhibit 88, provided by the Ford Motor Company in 1970. It depicts a number of models of Mustangs. Do you recognize any of those cars as being the car?

(Go to the next page.)

[5753] (Defendant Exhibit 88 was marked for identification.)

A The one circled.

Q The one circled is Mustang Mach Number One. As a matter of fact, you have seen this particular diagram before, have you not?

A Yeah; years ago.

Q Years ago—in 1970, when you testified at the Article 32 proceeding?

(Witness nods affirmatively.)

Q The car depicted here you say resembles the Mustang you saw in the driveway that evening?

A Yes (Witness nods affirmatively.)

Q Was there anything in particular about that episode that stood out in your mind besides the car pulling up and Helena getting out?

A Well, it was unusual for them to be painting the apartment at that time, but she acted like she was in a hurry to get inside. She kind of walked real fast getting inside.

Q How long had you lived next door to Helena at that point?

A About two or three months.

Q Did she wear any kind of special clothing that you were aware of?

[5754] A Yes; she wore a white hat all the time—you know—it was part of her, you know, character.

Q Let me show you a picture that has been marked D-87 and ask whether this looks familiar in any way?

A Yes.

Q You say "yes"? Does that look like the hat she was wearing?

A Similar.

Q You have to keep your voice up, please?

A Yes.

[5755] BY MR. SEGAL:

Q Did she wear anything else regularly as part of her clothing?

A She wore a purple-type shirt and she wore white boots a lot. I don't what type they are but she wore high-topped white boots, you know, kind of like they were real shiny, like patent leather-type things.

Q You have seen her in the last two days around court, haven't you?

A Yes.

Q Her hair is pitch black, I believe?

A Yes.

Q Did you ever see her when her hair was any other color?

A Yeah; her hair used to be longer and she used to be a lot skinnier than what she is now; and she used to have burgundy (sic) hair but she wore a blond wig a lot, you know. She had a wig she wore quite a bit.

Q And what length was that wig?

A Down to about right here.

Q A little above shoulder level?

A Right.

Q Did you learn about the murders that took place at Fort Bragg involving the MacDonald family; did you hear about that?

[5756] A Yes, the next day.

Q Did you have occasion to see or talk to Helena Stoeckley in connection with those murders at that time or any time shortly thereafter?

A A couple of days later I did.

Q Tell us about that, please?

A Well, Paul Bowman lived in the apartment right behind hers. You know, hers was like in the back of a big house and his was a separate little apartment; and he had a telephone and I used to use his telephone, you know, to make long distance calls and stuff.

And at the first of the month I would, you know, pay him for the calls and stuff. Well, he had got out of the service and he was going back to Oklahoma City, and I owed him for some telephone calls, and he came up one afternoon.

And I saw him out there and I went out there to talk to him, you know, about paying him for the calls. Well, Paul was a friend of Helena's, and we were standing there talking, and he said that the police had questioned Helena about her whereabouts.

And I said, "Well, I saw her that morning," you know. I said, "I could be an alibi for her," because I had seen when she come in that morning, you know.

Q Was she around when you made that statement?

[5757] A She walked—you know, she walked up and was talking with us, you know.

Q What if anything did she say or do when you made the statement that you had seen her come up that morning and you could be her alibi for her?

A Well, she kind of—you know, the word to use—backed off from me. You know, she kind of—you know, they had to leave then. They wanted to leave. They didn't talk no more.

Q Did you talk anymore at that time with Helena about the murders?

A No.

Q Were you aware of the time when the MacDonald funerals took place over at Fort Bragg?

A Well, I didn't know, you know, exactly what day, you know, that it happened; but my wife and I—we were going somewhere one day, and Helena was dressed in a solid black dress, you know, a long one.

And she had a black thing over her face.

Q You mean a veil?

A Yeah; and she went and got some wreaths like you see at a graveyard, and placed them along by her door and stuff; and she was setting there like she was crying all day, you know.

Q Sitting where?

[5758] A By her door; by her front door. And that evening on the news it showed Dr. MacDonald in his uniform and it said that he had just come from the funeral thing; you know, they had had services that day.

Q Did you talk to Helena about why she was sitting there in black?

A No, she wouldn't talk to nobody. Her boyfriend come up in the afternoon, and was trying to get her to go off; and, you know, they got in a big argument because she wouldn't leave.

She just sat there real quiet like all day.

Q At some point thereafter, did you talk to her about whether she was involved in the murders at the MacDonald house?

A Yeah, I talked to her—well, she left shortly after that, and I didn't see her no more for a while; and then about two days before I testified I went to Haymont.

I had already talked to you and you wanted to know what her name was—her full name—and I didn't know what her full name was, so I went to Haymont to try to find out.

You know, I knew that people up there knew her and I could find out her name. Well, when I went up there she was there, you know. Haymont's a section [5759] of town that everybody hung out in; and I talked to her then, and, you know, I'd asked her where she had been and everything, and she said, "Just around."

And I asked—you know, we started talking about the murder and everything, and we got into that.

Q And what did she say about the MacDonald murders?

A Well, when you talked to her—it is like—one—I don't know how to say it—one minute she's with you—you know, like in a normal conversation; then the next minute she's, you know, she was referring back to the murder.

You know, like she said that all she did, you know, was like hold the light; you know, that she didn't—she wouldn't kill anybody because she wasn't a hostile person, you know.

Q What about this light she was talking about?

A Holding the light would be the only thing she would do, you know. But she—you know, I said something to the reference that some policeman had seen them that morning, and she named the street, you know—Honeycutt—said that, you know, yes, she remembered, you know.

But it was like one minute she was there, you know, at the thing; then the next minute she was [5760] drifting back.

Q Back where you were?

(Witness nods affirmatively.)

Q Now, did she ever talk to you about seeing anything inside of any of the bedrooms in that house?

A She said that there was a kid's horse thing, but it wouldn't—it wouldn't roll. It would just stay still. It wouldn't roll, you know.

Q It was a hobby horse thing?

A Yeah, like, you know, like a little kid has, you know.

Q Yes; what did she say about that?

A It wouldn't move; you know, it wouldn't—

Q Rock?

A No. It wouldn't roll, you know; it was broke or something, it wouldn't move.

Q And when you talked to her about the house, did she say anything else that she remembered seeing there or any other thing that she remembered doing there?

A No.

Q Do you know whom that blue Mustang belonged to?

A No, I didn't know the guy's name, but, you know, I know what he looked like.

[5761] Q Who was that person—that is without his name? Was that somebody that Helena Stoeckley was connected with?

A Yeah, it was a friend of hers.

Q Had you seen that blue Mustang at the house before on other occasions?

A Yes, sir.

Q What is the last thing you ever said to Helena Stoeckley?

A The last occasion in Fayetteville?

Q That's right.

A I asked her what she did with her hat and boots and, you know, stuff; and she said she had got rid of them, you know.

But she kept—the whole conversation—two or three times during the conversation, she kept asking me—you know, I told her I had moved, you know; and she kept asking me what my new address was.

And I told her that, you know, the reason I had moved —that it was getting too rough in there; and she kept asking me over and over what my address was.

And when I was leaving the last thing she said to me was, "Tell your wife to lock the door," that "I'll be by to see you."

[5762] BY MR. SEGAL:

Q Was that said in jest or in seriousness as far as you could tell?

A To me, it was serious because it was like one minute, Helena was with you, and I don't know, it was like she was in another world the next minute, but I took it as serious; yeah. I didn't give her my real address.

Q You saw Helena yesterday when she was here in the Courthouse; did you not?

A Yeah.

Q Was that the first time since August of 1970, that you have seen her?

A Yeah.

Q Say "yes" or "no."

A Yes.

Q When you walked into the room—the conference room where we were sitting, what was the first thing that was said between you and Helena Stoeckley?

A You asked her if she knew me and she said, "Yes, that is Bill Posey. I told you to lock your doors and I would be by to see you." That is the last thing she said to me. Then, yesterday, after not seeing her all these years, that was the first thing she [5763] said to me.

Q Now, did anything happen back in August of 1970, to give you concern about not letting out your address?

A Well, my wife and I and her mother and husband, we went out to eat. Well, we had a cat and we had locked the cat inside the house, and I had a Doberman Pinscher. When we came back, my cat was outside, you know, wanting to go inside with us. I looked at Myer, which was my wife, and said, "We locked the cat inside. What is he doing outside," you know, and we stopped there and we went back out and on the side of my house, the first window going into the bedroom, you could see where somebody had opened it, you know, and went in that way.

We didn't go in the house. We went and got the police, you know, and they come up there and searched through it—searched through my house and everything.

Q Did Helena Stoeckley ever talk to you about being involved in witchcraft?

A Yeah.

Q Did she tell you that she was, herself, involved in witchcraft?

A She was a good witch.

[5764] Q That is what she said?

Q Was she ever involved in any rituals involving animals?

(Witness nods affirmatively.)

A Paul Bowman, to which I referred to a while ago, his wife—I can't remember her name now—but she was more or less the head of them. She was a witch, you know. She said she was a witch. They had a bunch of books on witchcraft. Like one time, my wife's sister and her boyfriend had a big fight—dispute. They went out in the woods and dug up herbs and spices to make them a love potion—

Q (Interposing) I have got to ask you, Mr. Posey, did it work?

A They were married.

Q One last question, Mr. Posey, did Helena Stoeckley ever conduct any ritual involving a cat?

A Yeah. They had a thing one time where they had like a seance-type thing and they crucified—well, I don't know—they killed a cat for part of their ritual thing or whatever it was.

MR. SEGAL: Cross-examine.

CROSS-EXAMINATION 3:16 p.m.

BY MR. BLACKBURN:

[5765] Q Mr. Posey, I believe you testified at the Article 32; did you not?

A Yes, sir; the Government thing.

Q The military proceedings?

A Yes, sir.

Q When that was taking place in 1970, you were working at the Heart of Fayetteville Motor Inn; is that correct?

A No, sir.

Q Where were you working?

A When the crime happened?

Q No, when the Article 32, the military proceeding?

A I was working for Fayetteville Linen. It is a linen company.

Q You had occasion to go to the Heart of Fayetteville Motor Inn; is that right?

A Yes; we delivered linen.

Q You saw Mr. Segal and Mr. Eismann at that time there?

A No. I called, you know, they had a hotline in Fayetteville where you call and you ask them about if you have got a problem or something and it comes out in the paper and they answered it. Well, I had called the hotline, you know, and told them what I [5766] knew, and if I should, you know, go forth with my information. So one day, we were there and the man that was showing the route and everything had mentioned that Mr. Eismann and Mr. Segal were staying there. I just decided to go forth and tell them what I knew.

Q And you did that?

A Yes, sir.

Q You never told the law enforcement agency, though, did you?

A No, sir. After I talked to Mr. Segal, there was a military man that came to my job one day and talked to me.

Q He did?

A Yes, sir; kind of a tall guy.

Q Do you recall that person's name?

A He was at the military hearing.

Q Could it have been Lieutenant Malley?

A He was a tall man. I can't remember if that was his name, though. He was on the, you know, prosecuting side.

Q Captain Malley?

A That might have been.

Q Did you ever recall being told by anyone prior to your testimony at the Article 32 that there was a reward being offered by anyone for testimony relating [5767] to this?

A They had mentioned it; yes.

Q Who mentioned it?

A Well, I had read about it in the paper and then—if it was Mr. Eismann or not that mentioned it—but the day that I talked to Mr. Segal, I told him that I was not interested in the reward money—that I was not there for that.

Q Now, the night that it happened or that you say that you went to the window—

A (Interposing) I went to my front door.

Q Do you recall whether or not she was wearing the hat?

A No. She didn't have the hat on. She had something in her hand.

Q You didn't see her hat?

MR. SEGAL: Let him finish. I OBJECT, Your Honor.

MR. BLACKBURN: I thought he was through. Finish your answer by all means.

THE WITNESS: She was in a hurry to get to the door. No, I did not see her with a hat on that morning, but I know she had a purple vest and stuff on.

BY MR. BLACKBURN:

Q Did she have a sheet on or anything like that?

A I didn't see her with a sheet; no.

Q Isn't it true that Helena has told you during that time that she was on drugs and did not know where she had been at that time?

A Yeah. She said she was tripping that night; yes, sir.

Q She didn't know where she had been?

A No. She said that she didn't know where she had been.

Q That was one of the reasons you suggested that you could perhaps give her an alibi because you had seen her?

A I had seen her that morning; yes.

Q Now, isn't it true that with respect to "pigs"—the term "pigs" that Helena had always told you that she called the police "pigs"?

A Yeah. Well, in the section, you know, like when people back then referred to "pigs," it didn't necessarily mean policemen, but it meant people in society—the Establishment—however you refer to it.

Q Has Helena ever told you that she was in the MacDonald apartment?

A She never point-blank said that she was in the apartment, but she did say like one minute like I was explaining a while ago, one minute, she would be in a [5769] normal conversation and then the next minute she would be like she was right there. But like she told me about trying to ride the toy and like she said about holding the light and things like that.

Q She told you that she held the light?

A She said, you know, that she would hold the light, but she wouldn't kill nobody because she wasn't a hostile—

Q (Interposing) I am sorry—are you through?

A Yes, sir.

Q Isn't is true that she said that that would have been what she would have done if she had been there because she couldn't kill anybody?

A I don't know how to answer that. She never said it like you have just said it—I mean like she said—she never said, "If I had been there, that is what I would have done." She didn't say it like that.

Q Tell us what she did say.

A She would say that like—

Q (Interposing) Let me make it easier for you. Did she ever suggest to you that she could have been holding the light?

A Yes.

Q Is that a fair statement?

A That is the way.

[5770] Q Isn't it true that she said to you that she could not have killed anyone?

A Yeah. She would emphasize that she did not have hostile tendencies.

Q Did she seem concerned to you that she did not know where she had been during that time period?

A You know, what I never understood was that like when she talked to me, she would be concerned that she didn't know where she was; but then like the day that they had the funeral service and everything, she mourned all day, you know—I couldn't understand.

Q You said she wore black, I believe?

A She wore a long black dress and a thing over her face. She had them flowers.

Q Do you recall reading anything in the newspaper about a child's hobby horse in connection with this crime?

A No. She mentioned that to me the night out by Haymont. I had never read that.

Q Now, the time when you went to the door, did you happen to look at the clock to see what time it was?

A Yeah. I got up to go to the bathroom, you know, I have a—I don't know if it is a habit or what, but for the longest I can remember, around 4:00, [5771] 4:30, or 5:00 o'clock, I get up and go to the bathroom. I mean, I do it all the time, you know. See, let me explain something. The reason that I went to the door to look out—we were having trouble with people blocking our driveways and stuff like this. Like a couple of mornings I got up to go to work and there would be people staying over there and they would have our driveway blocked and they would have, you know—they partied all the time and it was just, you know, you couldn't get any rest.

Q How long after you testified at the Article 32 did you remain in the Fayetteville area?

A Only a couple of days.

Q You left rather quickly?

A Yeah.

Q Do you recall being given $150 by Lieutenant Malley when you left?

A It was between $100 and $150; yes.

Q Did you know that he was a friend of Dr. MacDonald's; is that correct?

A No. All I knew was that he was with the military. That is all. That was for moving expenses, you know, that is all.

[5772] BY MR. BLACKBURN:

Q Do you recall ever talking to Mr. Brisentine?

A Who is he?

Q Prior to yesterday?

A I don't know who you are talking about.

Q He's the tall fellow—the tall thin fellow with sort of silvery hair. He has been here this afternoon. Do you recall seeing him prior?

A One man that I have seen before, yeah, years ago.

Q Do you recall ever telling Mr. Brisentine in the past that perhaps you were mistaken as to the night that you saw Helena?

A No.

MR. BLACKBURN: No further questions.

MR. SMITH: Any questions for the court?

MR. SEGAL: Just on your redirect very briefly to clarify a matter, Your Honor. May I?

REDIRECT EXAMINATION

BY MR. SEGAL:

Q Mr. Posey, you said that very shortly after you testified at the military proceeding that you left Fayetteville, is that right?

[5773] A They broke into my house, you know; somebody broke into my house; and when the police came, in my bedroom, there was a knife behind the door.

It was—oh, never mind.

Q Were you scared?

A Yeah, I was scared.

Q Where did you move to after you left?

A My home, Alabama.

Q Did you feel that the episode at your home was in any way related to the fact you had testified at the military proceedings?

A Well, that night when John and all of us went to the police there was a dirt alley about a block and a half from our house.

Jim, one of the guys that used to come over to Helena's, was in his yellow Plymouth sitting right there. We went down to the police station. He was right behind us following us down there, you know.

So I felt like I wasn't safe there, no.

Q What did you use the $150.00 for?

A To get a moving truck, you know; rent one of them U-Haul trucks to move with.

Q You moved down to Alabama?

A Yes.

Q Do you live there now?

[5774] A Yes, sir.

MR. SEGAL: Thank you very much.

THE WITNESS: I had a good job going and everything too.

MR. SEGAL: You left a good job in Fayetteville?

(Witness nods affirmatively.)

MR. SEGAL: Thank you, Mr. Posey.

UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF NORTH CAROLINA
FAYETTEVILLE DIVISION

Crim. No. 75-26-CR-3

UNITED STATES OF AMERICA, PLAINTIFF

vs.

JEFFREY R. MACDONALD, DEFENDANT

MOTION TO VACATE JUDGMENT OF CONVICTION AND DISMISS INDICTMENT

Defendant, JEFFREY R. MacDONALD, moves this Court, pursuant to 28 U.S.C. § 2855 and Rule 48(b) of the Federal Rules of Criminal Procedure, to vacate its judgment of conviction against him, dated August 29, 1979, and to dismiss the three-count indictment for murder against him. This Motion is based upon the government's violation of defendant's right to a speedy trial as guaranteed by the Sixth Amendment to the United States Constitution.

This the 4th day of September, 1979.

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SUPREME COURT OF THE UNITED STATES

No. 80-1582

UNITED STATES, PETITIONER

v.

JEFFREY R. MACDONALD

ORDER ALLOWING CERTIORARI

Filed May 26, 1981

The petition herein for a writ of certiorari to the United States Court of Appeals for the Fourth Circuit is granted.

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CLERK

No. 80-1582

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1980

UNITED STATES OF AMERICA,
Petitioner

vs.

JEFFREY R. MACDONALD,
Respondent

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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JEFFREY R. MACDONALD,

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals on the earlier interlocutory appeal taken by respondent is reported at 531 F.2d 196 (1976) and is reprinted *infra* (App. 1a *et* *seq.*).* The opinions on respondent's post-conviction appeal are reprinted in petitioner's appendix (Pet. App. 1a *et seq.*).

COUNTER STATEMENT

The wife and two small daughters of the respondent, Dr. Jeffrey MacDonald, who was then a captain in the Army's Medical Corps, were killed on February 17, 1970 at their home on the Fort Bragg, N.C., military reservation.** Each victim died as a result of a grisly attack involving multiple stab wounds and beatings with a club. The respondent himself suffered more than twenty wounds, including a life-threatening stab wound of the chest causing a partial lung collapse, ice-pick type punctures on his arms and stomach, and bruises to the head.

Dr. MacDonald told the police how he was awakened by the screams of his wife and one daughter, and then was attacked by several assailants and knocked unconscious. When he came to, he made a futile attempt to give medical assistance to his family and then telephoned for help. When the police and ambulance attendants arrived he was again unconscious.

Dr. MacDonald described to police the four assailants he had seen: there were three men, and a woman with long blonde hair who wore a floppy hat and shiny boots.*

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* The Fourth Circuit's opinion on the interlocutory appeal is relevant for present purposes (although this Court subsequently ruled that the appeal was premature, 435 U.S. 850 (1978)), because the court below, reviewing respondent's post-conviction appeal, adopted findings made by the first panel.

We also note that we have lodged with the Clerk of this Court Volume V of the appendix to respondent's brief on appeal in the Fourth Circuit. All transcript references herein are to pages contained in that volume, and are cited as "Vol. V., p. ___."

** A brief chronology is provided as Appendix B hereto.

An investigation of the crime was immediately begun by the Army's Criminal Investigation Division (CID), the F.B.I., and the Fayetteville (N.C.) police department. (App. 4a–5a) A team of experts from the CID laboratory examined the crime scene for a week and collected hundreds of items of physical evidence which thereafter formed the basis of the government's case in both the military and civilian criminal proceedings. The laboratory analysis of the evidence was completed within a matter of weeks.

On April 6, 1970, Dr. MacDonald was informed that he was a suspect and was restricted to quarters. On May 1, 1970, he was formally charged with the murders, placed under arrest, and confined under armed guard to his quarters. (App. 4a)

Shortly thereafter an Investigating Officer, Colonel Warren V. Rock, was appointed, pursuant to Article 32, Uniform Code of Military Justice, 10 U.S.C. 832, to examine the charges against Dr. MacDonald and to recommend whether there was any basis for a court martial.

The evidence presented by the government at the military justice proceedings was wholly circumstantial, consisting of physical artifacts found at the crime scene. Fifty-six witnesses, including respondent, were heard by the Investigating Officer. (App. 5a)

At the conclusion of the proceedings in October 1970, Colonel Rock prepared a 90-page report concluding:

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* A police officer recognized the description as resembling a woman he had seen on the street a few minutes earlier as he was racing to the MacDonald home. He was suspicious of her presence but was under orders to respond to an emergency call.

(1) that the charges against Dr. MacDonald were "not true," and (2) that there was sufficient evidence against a woman named Helena Stoeckley to require an investigation by civilian law enforcement agencies of her involvement in the murders and the assault on Dr. MacDonald. (App. 5a)

The charges against Dr. MacDonald were then dismissed by the Army. In January 1971, however, the Justice Department requested that the CID reopen the matter. From that time on, it is clear that Dr. MacDonald remained the primary suspect. The ensuing investigation by the CID was completed in December 1971, eleven months later. It had interviewed 699 witnesses and reexamined the physical evidence in crime laboratories. (App. 6a) No new physical evidence was uncovered. (App. 6a, 17a–18a) The CID then took six more months to assemble its findings and write a report, which was submitted to the Justice Department in June 1972. (App. 6a)

From June 1972 until August 1974, when a grand jury investigation was begun, there was no significant investigative activity in the case (App. 17a–18a, Pet. App. 4a–5a), although Dr. MacDonald, in person and through letters from his attorneys, urged that the Justice Department complete its investigation, and offered his full cooperation. Attorneys in the Justice Department debated whether to prosecute Dr. MacDonald, but no action was taken for two years, until 1974, when a new Justice Department attorney was assigned to the case. He began to present evidence to the grand jury (before whom respondent testified) in August 1974. (App. 6a, Pet. App. 8a)

On January 24, 1975,* an indictment was returned and on January 25, 1975 respondent was again arrested. He promptly filed motions to dismiss the indictment on speedy trial and double jeopardy grounds. The district court denied those motions and the court of appeals stayed the trial pending hearing of an appeal. (App. 1a)

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* This was less than one month before the applicable 5-year statute of limitation would have run.

The court of appeals, stating that its jurisdiction over the double jeopardy issue was clear, nevertheless premised its decision reversing the district court and ordering the indictment dismissed on the speedy trial ground. In that connection it found the following facts:

Respondent had been arrested and incarcerated by the Army on May 1, 1970, the starting point for the speedy trial inquiry. Following respondent's discharge from custody six months later, there was a period of approximately 18 months of intense investigatory activity by both military and F.B.I. investigators. (App. 17a) But, from June 1972 until the government began presenting evidence to a grand jury in August 1974, there was an unexplained, unwarranted and lengthy delay during which "no significant new investigation was undertaken," *Id.*

> The leisurely pace from June 1972, until the indictment was returned in January 1975, appears to have been primarily for the government's convenience. The Assistant United States Attorney for the Eastern District of North Carolina, who is familiar with the case, expressed an even harsher assessment for the delay. He told the magistrate at the bail hearing that the tangible evidence had been known to the government since the initial investigation in 1970 but that it had not been fully analyzed by the F.B.I. until the latter part of 1974. He explained that the F.B.I. analysis was tardy "because of government bureaucracy." (App. 17a–18a)

The court of appeals further found that Dr. MacDonald fully cooperated with the government during its investigation prior to the return of the indictment, and consistently expressed a desire that the matter be settled as promptly as possible, because of the unfounded suspicion to which he was subjected. (App. 6a–7a, 19a–20a)

In analyzing the case as it stood prior to trial, the Fourth Circuit concluded that there was substantial prejudice to respondent. While the government's case rested entirely on circumstantial evidence, the court of appeals concluded that the memory of witnesses who would testify about that physical evidence would be suspect because of the passage of time. (App. 21a–23a) This coupled with the factors of personal prejudice resulting from delay — anxiety, stress, the severe financial pressures occasioned by the continuous need to retain counsel, and the ongoing adverse publicity — satisfied the court that under the criteria enunciated in *Barker v. Wingo,* 407 U.S. 514 (1972), and *United States v. Marion,* 404 U.S. 307 (1971), the indictment should be dismissed. (App. 22a–24a)

The United States filed a petition for certiorari, challenging the court of appeals' holding that it had jurisdiction of the speedy trial issue in advance of final judgment. This Court granted the petition and reversed on jurisdictional grounds, carefully noting that it had not reached the merits of respondent's claim, 435 U.S. at 863.

Upon remand, the Fourth Circuit ruled against Dr. MacDonald's double jeopardy assertion and returned the case to the district court.

The government's case at trial in 1979 consisted solely of highly technical, circumstantial evidence. The physical evidence which was introduced had been in possession of the government since the original CID investigation in 1970. Neither at the Article 32 Investigation, nor at trial, did the government purport to show any motive for the respondent to have committed the crimes.

The defense called Helena Stoeckley to the stand but she claimed that she had no recollection of her activities during the critical hours when the crimes occurred (the early morning hours of February 17, 1970), although she recalled her whereabouts shortly before and shortly after. She also said that she did not recall having made any statements placing herself at the scene. Respondent then attempted to introduce the testimony of seven witnesses to whom Helena Stoeckley had made admissions implicating herself as the woman with the floppy hat, long blonde hair and boots described to the police by Dr. MacDonald. At the prosecution's urging, the district court excluded the evidence on the ground that Stoeckley was not a reliable person.

Respondent was convicted and sentenced to three consecutive terms of life imprisonment. The court of appeals (a different panel from that which heard the earlier case) reversed the conviction and ordered the indictment dismissed, on the ground that Dr. MacDonald's speedy trial rights had been violated.*

The court below noted that respondent had "vigorously pursued his right to a speedy disposition of the charges against him." (Pet. App. 8a) It found further that the length of delay between the dismissal of the Army's charges and the return of the indictment was excessive and was due entirely to "unwarranted bureaucratic delay" (Pet. App. 5a), resulting from:

> . . . either a disagreement between two groups in the Justice Department as to whether the case should be prosecuted, or just simple government

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* The court accordingly found it unnecessary to rule definitively on various claims of trial error. It did, however, indicate its disagreement with the rulings excluding testimony concerning Stoeckley's admissions against penal interest. *See* Pet. App. 13a.

> bureaucracy (the contention of the involved Assistant U. S. Attorney). (Pet App. 8a)

"[T]he government's calloused and lackadaisical attitude . . . was solely responsible for at least the last two years of delay," (Pet. App. 16a) which was characterized as "irresponsible administration of justice." *Id.*

As in the 1976 opinion (App. A), the court below emphasized that the delay in bringing respondent to trial resulted in serious "personal prejudice to the accused." (Pet. App. 16a) "Not only was he under a cloud of suspicion for five years prior to trial, but the personal pressure and anxiety of a threatened prosecution for murder is demonstrated by the expense and concern he expended in attempting to have the charges resolved." *Id.*

The court further found that the defense suffered substantial prejudice because of its inability to bring to the jury the information that Stoeckley might have provided in the absence of long delay:*

> The likelihood that Stoeckley would testify that she could not remember was inevitably increased by the passage of the period of inexcusable delay. The consequences of having put on a witness who was to have verified MacDonald's own version of a Manson-like intrusion, only to have her fail to do so, may well have been disastrous to the defense . . . . Had Stoeckley testified as it was reasonable to expect she might have testified, the injury to the government's case would have been incalculably great . . . . The government's inexcusable delay of over two years' duration cannot be eliminated as a potential — in-

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* In addition, the lower court observed other trial prejudices; for example, the inability to cross examine witnesses whose memory, nine years after the events, may have been altered by prosecutors' preparation, and, in general, "memory erosion." (Pet. App. 10a–11a)

deed a probable — cause of that memory lapse. (Pet. App. 11a–12a)

The Government's motion for reconsideration *en banc* was denied by a divided court. (Pet. App. 29a)

ARGUMENT

1. The Government asserts that the instant case presents a legal issue of general importance which this Court should review because the court of appeals included "in its speedy trial calculations the period from October 1970, to January 1975, during which time respondent was not under arrest, indictment or any other legal restraint . . . ." (Pet. 12)

A more appropriate formulation of the issue would be to incorporate the following findings of the court below, all of which were predicates of its determination that in the particular circumstances of this case the Sixth Amendment's guarantee of speedy trial was violated: That on May 1, 1970, following investigation by the Army Criminal Investigation Division, the Federal Bureau of Investigation and state authorities, respondent was formally charged by the military arm of the United States with the crime for which he was ultimately tried in 1979; that from May until the end of October 1970, he was "under actual restraints" and "holding to answer a criminal charge" (Pet. App. 4a); that, after an exhaustive hearing at which fifty-six witnesses testified, the military authorities determined that the charges were "not true" and should be dismissed; that nonetheless, at the instance of the Department of Justice, unremitting investigations by that Department and the CID continued between 1970 and June 1972; that, although the "Justice Department was in possession of all the evidence from June 1972," "nothing occurred until presentation to a grand jury began in August, 1974" (Pet. App. 5a); that this delay, for which the Department was "solely responsible" (Pet. App. 16a), was "excessive," "undue," "inexcusable," and "unwarranted" (Pet. App. 5a, 10a, 18a); that the dropping of charges by the military did not dispel the effects of the government's initial accusation (App. 13a–14a); that Dr. MacDonald was subjected to "extremely intrusive publicity" (Pet. App. 6a), remained under a "cloud of suspicion" (Pet. App. 16a) and was obliged in prudence "to retain attorneys at his own expense for his continuing defense" (App. 14a); that at all times Dr. MacDonald and his attorneys fully cooperated with the authorities and "vigorously pursued his right to a speedy disposition of the charges against him" (Pet. App. 8a); and that, "viewed in the light of all the evidence developed at trial," the government's inexcusable delay resulted in prejudice to the defense (Pet. App. 14a, 18a).

It is against this background that one must appraise the Government's claim that the court below misconstrued this Court's decisions in *United States v. Marion,* 404 U.S. 307 (1971) and *Dillingham v. United States,* 423 U.S. 64 (1975).

In *Marion, supra,* the appellees asserted a Sixth Amendment claim on the ground that there was a three-year delay between the time that the Government obtained the information upon which an indictment might have been sought and the time it proceeded to do so. The Court rejected the claim, declining "to extend the reach of the amendment prior to arrest. Until this event occurs, a citizen suffers no restraint on his liberty and is not the subject of public accusation . . .," 404 U.S. at 321. Contrasting the case in which there has been an arrest prior to the filing of a formal charge, the Court stated, 404 U.S. at 320:

> Arrest is a public act that may seriously interfere with the defendant's liberty, whether he is free on bail or not, and that may disrupt his employment,

drain his financial resources, curtail his associations, subject him to public obloquy and create anxiety in him, his family and his friends.

There is no dispute that Dr. MacDonald was arrested, that he was under restraint for some six months and that the notoriety was extreme. The Government nevertheless approaches the case as if the arrest, the military charges and the confinement had never taken place, asserting that Dr. MacDonald was under no *formal* charges during the long period of delay that occurred subsequent to his initial release and prior to the return of the indictment on which he was tried. The short answer, two panels of the court of appeals found, is that the effect of the initial accusation was not dispelled. That is plainly so. The Government, by its own account, conducted 699 interviews between January and December 1971. (App. 6a) National newspaper publicity was unceasing. Dr. MacDonald "remained under suspicion and was subjected to the anxiety of the threat of another prosecution." (App. 14a) In these circumstances, the court below properly concluded, the Government was under an obligation to bring the matter to a final resolution without excessive delay. Instead, it let the case lie on the shelf for upward of two years after its second exhaustive round of investigation was completed and all the evidence was in.*

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* *Dillingham v. United States*, 423 U.S. 64 (1975), reaffirmed the view, previously stated in *Marion*, that an arrest activates the Sixth Amendment's provision for speedy trial. This Court, *per curiam*, reversed the court of appeals for its failure, in considering a speedy trial claim, to count an interval of twenty-two months that elapsed between the petitioner's arrest and indictment. *See also, Klopfer v. North Carolina*, 386 U.S. 213 (1967), in which a state prosecutor moved to take a "nolle prosequi with leave," a procedure that discharged the accused but left open the possibility of a revived prosecution. Because the threat of prosecution had not been laid to rest and the State had offered no justification for an indefinite postponement of final resolution, this Court ruled that the right of speedy trial had been violated. As Judge Butzner observed for the court of appeals in 1976, Dr. MacDonald's "situation, viewed realistically, was similar to Klopfer's." (App. 16a)

Viewed against its factual background, the decision below implements, rather than departs from, the teaching of *Marion, supra*. If an arrest is a public act that activates the speedy trial guarantee because it may cause public obloquy, drain financial resources, impair associations and cause continuing anxiety over the threat of prosecution, then surely it is appropriate to rule, in a case in which those consequences are experienced in extreme form and are unremitting, that the Government must at least proceed with reasonable promptness after its investigations are completed, lest it damage unnecessarily the very interests the Constitutional provision is designed to protect. Judge Murnaghan, the author of the opinion below, has emphasized the circumscribed character of the court's ruling (Statement on Request for Rehearing, Pet. App. 48a–49a):

> . . . I should not pass, in complete silence, the dissent's principal plaint: its contention that time between dismissal of an indictment (or its equivalent) and the processing of a subsequent indictment should not count for purposes of determining whether a speedy trial has been denied. Few, if any, absolutes exist in our judicial system. Each case presents its peculiar difficulties. . . . Here the situation was such that, from October 1970 . . . until indictment in 1975, MacDonald's possible involvement was not dormant. The immense publicity and the continued inquietude because the matter was not put to rest engaged the tenets of the Sixth Amendment.

2. The Government's claim of a conflict among the circuits is likewise unpersuasive. While one can find language indicating that a delay between dismissal of a charge and its reinstitution may be ignored for Sixth Amendment purposes, each of the cases cited by the Gov-

ernment is entirely consistent with the result reached below. In each, it appears that there was either no claim of specific prejudice to the defendant or that the claim, if made, was found to be without adequate support.

We turn to the two cases upon which the Government principally relies (Pet. 15). In *United States v. Martin*, 543 F.2d 577 (6th Cir. 1976), *cert. denied*, 429 U.S. 1050 (1977), involving dismissal of an indictment on charges of counterfeiting and a subsequent reindictment for the same offense, it appears that there was no showing of prejudice. The court was further of the view that the period was "insufficient" to make out a Sixth Amendment violation. To be sure, the court also stated that because there was "no indictment which could have been tried" during the intervening period, "we cannot say that a speedy trial was delayed during that time," *id.*, at 579. This proposition, however, is plainly untenable. This Court has unequivocally recognized in both *Marion* and *Dillingham* that the Sixth Amendement is implicated by delay between an arrest and an indictment; that is likewise a period during which "no indictment could have been tried." More importantly, *Martin* was overruled *sub silentio* by the Sixth Circuit in *United States v. Roberts*, 548 F.2d 665 (6th Cir. 1977), *cert. denied*, 431 U.S. 920, 431 U.S. 931, 433 U.S. 913 (1977).

In *United States v. Bishton*, 463 F.2d 887 (D.C. Cir. 1972), the appellant was initially charged with a bribery offense under the District of Columbia Code. The trial court dismissed on the ground that there was a defect in the information, and the Government appealed. The District of Columbia Court of Appeals affirmed the dismissal and the Government obtained a federal indictment under the United States Code, three months later. Considering the appeal taken following conviction in the federal court, the court of appeals stated, 463 F.2d at 890, "We do not intimate that the delay caused by appeals by the Government may never constitute denial of a defendant's right to speedy trial." It proceeded to find, however, that the prosecutor had acted reasonably in initially charging under the District of Columbia Code; that his appeal was taken in good faith, the defect in the information being "highly technical," *id.* at 891, and that examination of the trial record failed to show that the defendant had been prejudiced by the fact that the Government initially took the wrong route, *id.* The court concluded, 463 F.2d at 891—892, "If this were a case where the delays could not be explained or justified by the Government, or where the defendant's ability to present a defense was demonstrably affected, or where the Government's case on the merits was close, then the balance between the interest of the public and the protection of the individual might be different."

The Government's petition suggests (Pet. 15) that the *Bishton* court did not consider the interval between the first and second prosecutions "for speedy trial purposes" but only in relation to the Fifth Amendment's guarantee of due process. The fact is that the opinion, at various points, looks to both Fifth and Sixth Amendment criteria. In all events, it is undeniable that the result is fully consistent with the instant case in which the delay was held unjustified and serious prejudice found.

Finally, we point out that the District of Columbia Circuit, in a subsequent case not cited by the Government but presenting the same issue of delay between prosecutions, squarely relied upon the applicability of the Sixth Amendment. In *United States v. Lara,* 520 F.2d 460 (D.C. Cir. 1975), the defendants were initially indicted in October 1972. A superseding indictment was returned in January 1973. In February and March 1973 these indictments were dismissed. The defendants were not reindicted until December 1973, after a nine-month period during which no formal charges were pending against them. The court of appeals considered the *entire* period from the first indictment to the trial and concluded that the defendants' Sixth Amendment rights had been denied.*

3. The government, proceeding from its premise that the Sixth Amendment is inapplicable to the delay it caused, asserts that the prejudice to Dr. MacDonald is insufficient to establish fundamental unfairness under the Fifth Amendment. The court below did not reach that

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* The remaining cases cited by the Government (Pet. 16) may be addressed summarily. Although there is language in *United States v. Hillegas*, 578 F.2d 453 (2d Cir. 1978) favorable to the Government's position, the critical fact is that the court found the defendant's claim of prejudice "plainly insubstantial," 578 F.2d 460-461 at n. 10. Moreover, it did recognize that at least in some circumstances "substantial arrest-related disabilities may persist even after the dismissal of a criminal complaint," 578 F.2d at 458, n. 3.

Arnold v. McCarthy, 566 F.2d 1377 (9th Cir. 1978) examined a period of delay between a declaration of mistrial and subsequent retrial under a due process rather than a Sixth Amendment standard. Subsequently, the Ninth Circuit stated in *United States v. Henry*, 615 F.2d 1223 (9th Cir. 1980) that *Arnold* was "inapposite" when there is a delay between dismissal of a charge and reindictment, because in the mistrial situation there is not "the same opportunity for abuse by the government," 615 F.2d 1233 at n. 13. *Arnold* has thus been limited to its facts. In Henry's case the decision denying relief was rested on his concession that he had not been prejudiced by the delay in reindictment.

United States v. Stoker, 522 F.2d 576 (10th Cir. 1975) dismisses the matter of delay between dismissal of the first indictment and return of a second indictment with the cryptic comment that it was the defendant who apparently procured the dismissal. In all events, that circuit's more recent decision in *United States v. Huffman*, 595 F.2d 551 (10th Cir. 1979), adopts the view that where an original charge is dropped and succeeded by a second indictment charging the same offense, the appropriate analysis requires measuring the delay from the original arrest or charge and judging it by the *Barker v. Wingo* standard. *See* 595 F.2d. at 557, n. 3, citing *United States v. Merrick*, 464 F.2d 1087 (10th Cir. 1972), *cert. denied*, 409 U.S. 1023 (1972).

issue, having concluded — correctly, as we believe — that a violation of the speedy trial provision had been shown. We address the matter of prejudice to demonstrate, *first*, that the court below was clearly correct in holding that the Sixth Amendment standard was met (a point not seriously disputed in the petition), and, *second*, that the record would likewise fully support a determination that the trial was rendered fundamentally unfair by the delay. We particularly emphasize that the defense lost the benefit of the testimony of Helena Stoeckley, a woman who answered Dr. MacDonald's description of the female intruder and who has repeatedly admitted, outside the courtroom, that she was one of four persons who invaded the MacDonald household and committed the crimes charged to him.*

First, however, we note briefly the court's findings as to other aspects of prejudice. As already observed, it found that Dr. MacDonald suffered serious prejudice prior to trial — public obloquy, extended anxiety and stress, continuing drain upon financial resources. With respect to the trial itself, it found that there are peculiar hazards for a defendant in dealing with a hypothetical reconstruction of a crime and in combatting "an array of technical evidence. The technical witnesses frequently are relying on scientific speculation and trial and error." (Pet. App. 16a at n. 7) The difficulty of examining the basis of their claims and observations is aggravated when memories have faded and the witnesses rely on statements or writings made years before. "The risk to MacDonald," the court stated (Pet. App. 10a), "was simply too great that, in preparations *prior to the testifying* of each witness, the prosecutors helped fill lacunae of recollection, and assured consistency of support for their theory of the case . . . " *Id.* (italics in original) The length of the intervening period "rendered it virtually impossible for MacDonald to probe the recollections of each witness . . . " *Id.*

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* As we also point out *infra*, it was at the Government's insistence that the trial court, compounding the injury, indefensibly excluded testimony concerning Stoeckley's admissions against penal interest.

Helena Stoeckley should have been the vital witness for the defense. MacDonald's description of the female intruder was sufficient to suggest to a local officer (Beasley) that Stoeckley, whom Beasley had used as an informant in drug cases and found reliable*, might be the woman. Questioned by Beasley the day after the crime, Stoeckley implicated herself. Some days thereafter, she volunteered to a neighbor, one Posey, that she had been seen by policemen at an intersection near the MacDonald house shortly after the murders. She said further that all she had done was to hold the light during the murders and that she herself did not kill anybody. She made additional inculpatory admissions to five other persons (one, a CID investigator, another, a Nashville police officer, the others, friends or acquaintances) in 1970, 1971, 1972 and 1979. The admissions were fragmentary — she would say something about her involvement, then, apparently believing that she had said too much, withdraw — but they were damning.**

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* Detective Beasley testified she was "the most reliable informant I ever had." (Vol. V, p. 1221) Another police officer, when asked if he believed her inculpatory statements to him testified, "I would have investigated further, and I would have indicted her . . ." (Vol. V, p. 1195)

** Among her admissions were the following, as recounted by her auditors on *voir dire* before the district judge:

The jury, however, heard nothing from Stoeckley

"I can't ever go home [to Fayetteville] again . . . [b]ecause I was involved in some murders." (Vol. V, p. 1178)

"[Stoeckley] knew about the blood on the bed." (Vol. V, p. 1215)

"So much blood. So much blood. I couldn't see or think of anything but so much blood." (Vol. V, p. 1182)

"She said that there was a kid's horse thing, [in one of MacDonald's children's room] but it wouldn't — it wouldn't roll. It would just stay still. It wouldn't roll, you know . . . it was broke or something, it wouldn't move." (Vol. V, p. 1241)

"It's a memory. I remember standing at the couch, holding a candle, only — you know — it wasn't dripping wax. It was dripping blood." (Vol. V, p. 1265)

"In my mind it seems that I saw the thing [the murders] happen. I was heavy on mescaline." (Vol. V, p. 1223) [Police Officer was asked whether Stoeckley admitted being present at the assaults on the MacDonald family.] "That is correct, but [she] had not been involved in the actual killings themselves." (Vol. V, p. 1193–1194)

"I talked with [Stoeckley] on several occasions about the murders. She said she thought she had been there when the murders took place." (Vol. V, p. 1189)

"[Stoeckley] said that all she did, you know, was like hold the light; you know, that she didn't — she wouldn't kill anybody because she wasn't a hostile person, you know." (Vol. V, p. 1240)

[Speaking of the night of the murders,] "When I came to myself, I was in the rain. It was raining. I was terrified." (Vol. V, p. 1179)

"[Stoeckley said] It had been drizzling rain during the night but that it did not start to rain hard until after the homicides." [When asked a question by the investigator she refused to say more and explained:] "I've already said too much." (Vol. V, p. 1208–1209)

[Stoeckley said that on the night of the murders] "it was raining heavily; and she was afraid her wig would be ruined, and she was worried about the wet wig." (Vol. V, p. 1183)

"[Stoeckley discussed the clothing she wore on the night of the murders] . . . she had on her blonde wig and her white boots [and she said] 'I loved them but I had to get rid of them'." (Vol. V, p. 1183) concerning events at the MacDonald house. Called to the stand by the defense, she said that she did not recall her whereabouts or activities during the critical hours (midnight to 4:30 a.m.) though she remembered what occurred before and after. The court below observed that the failure of Stoeckley to verify "MacDonald's own version of a Manson-like intrusion . . . may well have been disastrous to the defense." (Pet. App. 11a–12a) "Had Stoeckley testified as it was reasonable to expect she might have testified, the injury to the government's case would have been incalculably great." (Pet. App. 12a) The opinion continues *(id.):*

> The possible reasons why Stoeckley did not testify are several. But the reason she asserted under oath was failure of memory. The government's inexcusable delay of over two years' duration cannot be eliminated as a potential — indeed a probable — cause of that memory lapse.

[After Stoeckley was told that she had been seen by a military policeman near the crime scene that night, she responded by correctly naming the street] "you know, — Honeycutt." (Vol. V, p. 1240)

"After the night of the MacDonald incident . . . she was in a joyful mood and joked about her ice pick.' [One of the four murder weapons was identified as likely to have been an ice pick.] (Vol. V, p. 1231)

[Stoeckley talking about the men she was with on the night of the MacDonald murders] "They killed her and the two children." (Vol. V, p. 1197)

"[Stoeckley said] she went into hiding to evade police arrest." (Vol. V, p. 1206)

[Stoeckley was questioned by a CID agent concerning her willingness to testify about the crime. She said] "That if the Army would give her immunity from prosecution, she would furnish the identity of those offenders who committed the murders and explain the circumstances surrounding the homicides." (Vol. V, p. 1207)

It would be no answer, moreover, that the loss of memory may have been feigned. If matters had been brought to a prompt resolution, it cannot be presumed that Stoeckley would have had the temerity to engage in such a pretense.

The damage resulting from Stoeckley's asserted loss of memory might well have been allayed or cured by the introduction of her repeated out-of-court admissions against interest. Instead, it was compounded by indefensible error. When the defense offered the testimony of seven witnesses to whom Stoeckley had made inculpatory statements, the prosecution vigorously objected that Stoeckley was unreliable and that therefore the testimony of the seven should be excluded.* The objection was sustained but the testimony of the proffered witnesses was preserved for appellate review at a *voir dire* hearing requested by the defense.

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* The issue under Federal Rule of Evidence 804(b)(3), is not whether the person who made the out-of-court declarations against penal interest is a reliable person; the question is whether the declarations are credible. Here, the statements contained internal earmarks of reliability and there were strong corroborating circumstances, not least of them Dr. MacDonald's description of the woman intruder. Commenting on the Rule, Judge Weinstein has stated (4 *Weinstein's Evidence* 804-104, 804-105):

> The court should only ask for sufficient corroboration to "clearly" permit a reasonable man to believe that the statement might have been made in good faith and that it could be true. If, for example, the proof is undisputed that the person confessing to a shooting could not have been at the scene of the crime because he was in prison, it will be excluded. But if there is evidence that he was near the scene and had some motive or background connecting him with the crime that should suffice.

See also, Judge Murnaghan's comments below, Pet. App. 13a. Indeed, if the Rule were not construed to permit the introduction of admissions against penal interest in the instant circumstances, it would violate this Court's constitutional ruling in *Chambers v. Mississippi,* 410 U.S. 284 (1973).

In sum, the defense was deprived of the opportunity of introducing Stoeckley's account directly (traceable, in the court's words (Pet. App. 16a), to the Justice Department's "calloused and lackadaisical attitude" in proceeding with the case) and deprived also of the opportunity of offering it indirectly through Stoeckley's out-of-court declarations (this traceable to the prosecutor's misguided efforts to keep from the jury the words of the one identified living person, other than Dr. MacDonald, who admitted to having been on the scene).* The result, we submit, was fundamentally unfair.

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* In view of the publicity the matter has received, we make note of the fact (not a part of the record) that Helena Stoeckley, in December 1980, granted an extended interview to a reporter for the Fayetteville [North Carolina] Times, recounting her knowledge of the MacDonald murders. The story was widely disseminated by the Associated Press (*see* copy reprinted as Appendix C) and reports, *inter alia*, that Stoeckley has now named the other persons involved in the attack. The story also makes reference to the fact that Stoeckley had previously been interviewed by "Ted Gunderson, a Los Angeles private detective."

Gunderson, a retired chief of the Los Angeles office of the F.B.I., was retained by friends of Dr. MacDonald, following MacDonald's conviction in August 1979, to see if he could develop additional evidence. Gunderson succeeded in locating Stoeckley who, after initially refusing to talk to him, agreed to be interviewed. Several lengthy interviews took place between October and December of 1980. Counsel for Dr. MacDonald have made copies of these interviews and of Gunderson's report available to the Department of Justice. Stoeckley's decision to speak to the press was her own.

CONCLUSION

The decision below, finding a violation of the Sixth Admendment's guarantee of speedy trial, rests on the particular circumstances of this case and presents no question of general importance warranting this Court's review. The record is one which would also support, were there any occasion to go further, a finding of violation of Fifth Amendment standards.

In few criminal cases has a defendant remained under prosecution or active threat of prosecution for a period extending in excess of eleven years. There is compelling reason to believe that, but for the prosecution's delay and its successful opposition to the defense's effort to bring vital admissible testimony to the attention of the jury, there would have been no conviction and no occasion for appellate review. The cause has now been reviewed at length in the court of appeals. It should not be further protracted.

The petition for a writ of certiorari should be denied.

Respectfully submitted.

RALPH S. SPRITZER
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Attorneys for Respondent

May 1981

Appendix A

[196] UNITED STATES of America, Appellee,

v.

Jeffrey R. MacDONALD, Appellant.

Nos. 75-1870, 75-1871.

United States Court of Appeals,
Fourth Circuit.

Argued Oct. 8, 1975.
Decided Jan. 23, 1976.

• • •

[198] Before CRAVEN, BUTZNER and RUSSELL, Circuit Judges.

BUTZNER, Circuit Judge:

Jeffrey Robert MacDonald appeals from the denial of several motions relating to his prosecution for the 1970 deaths of his wife and two daughters.[1] We conclude that the [199] delay of four and one-half years, dating from the Army's accusation and detention of MacDonald in May 1970 to his indictment in January 1975, even when allowances are made for several intervals, violates the right to a speedy trial guaranteed by the sixth amendment.[2] We therefore reverse and order dismissal with prejudice.

I

We stayed MacDonald's trial and allowed this interlocutory appeal pursuant to our decision in *United States v.*

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[1] The district court has jurisdiction because the crimes were committed on a military base. 18 U.S.C §§ 7(3), 1111, and 3231.

[2] "In all criminal proceedings, the accused shall enjoy the right to a speedy and public trial . . .." U.S. Const. amend. VI.

Lansdown, 460 F.2d 164, 170-71 (4th Cir. 1972).[3] There, we held that 28 U.S.C. § 1291 did not bar an interlocutory appeal in criminal cases where important rights, collateral to the main action, would be irreparably lost unless considered before trial. *But see United States v. Bailey,* 512 F.2d 833 (5th Cir. 1975). In *Lansdown* the appeal was from an order rejecting a plea of double jeopardy. We held that post-trial consideration of the issue could provide only inadequate relief because the double jeopardy prohibition was intended to prevent the hardship of undergoing a second trial. *See Green v. United States,* 355 U.S. 184, 187, 78 S.Ct. 221, 2 L.Ed.2d 199 (1957). The denial of MacDonald's plea of double jeopardy, like Lansdown's, is a proper subject for interlocutory review, but for reasons discussed in Part IV, we believe it preferable not to decide this issue. Instead, we have rested our decision on the sixth amendment's provision for a speedy trial.

Pendent to the double jeopardy claim, and closely related to it, is MacDonald's affirmative defense of denial of a speedy trial. This sixth amendment claim is also collateral and can be decided without considering the merits of the charges against MacDonald. The guarantee of a speedy trial is a fundamental constitutional right. *Braden v.*

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[3] In our order of August 15, 1975, allowing MacDonald's petition for an interlocutory appeal, we noted his contentions that he had been denied his rights against double jeopardy and to a speedy trial. We then concluded ". . . that the contentions made are not frivolous and that the rights asserted are too important to be denied review, and if review is postponed until after the trial of the case, claimed rights will have been irreparably lost. *United States v. Lansdown* . . ."

We also allowed MacDonald to appeal issues that would otherwise be subject to the final judgment rule, saying: "In view of our accepting the appeal of [the orders overruling the double jeopardy and speedy trial defenses], we will also consider the other questions sought to be appealed, which, if not now presented, might occasion further delay in terminating this litigation." *See* part IV *infra.*

Judicial Circuit Court, 410 U.S. 484, 489-90, 93 S.Ct. 1123, 35 L.Ed.2d 443 (1973); *Klopfer v. North Carolina,* 386 U.S. 213, 223-25, 87 S.Ct. 988, 18 L.Ed.2d 1 (1967); *Kane v. Virginia,* 419 F.2d 1369, 1371-73 (4th Cir. 1970). Not every speedy trial claim, however, merits an interlocutory appeal. Generally, this defense should be reviewed after final judgment. It is the extraordinary nature of MacDonald's case that persuaded us to allow an interlocutory appeal.

The hearing conducted by the Army in 1970 lasted for more than a month, and the government estimates that the trial would take six to eight weeks. The prosecution's case is wholly circumstantial and rests on a detailed, hypothetical reconstruction of the crime. Witnesses, who have scattered across the country in the last five years, must be interviewed and assembled at great expense to both the government and the defense.

MacDonald's collateral defenses of double jeopardy and denial of a speedy trial are not fanciful. Never before, as we mention in Part IV, has a soldier been prosecuted by civilian authorities after being exonerated by his commanding officer following an Article 32 hearing; and a delay of five years between the initiation of prosecution and trial is extraordinary. Had we denied the interlocutory appeal and subsequently sustained either of MacDonald's collateral defenses, all of the burdens on the [200] court and the parties of a prolonged, expensive trial would be for naught. These factors, which we regard as unique, were the basis for allowing this appeal.

II

In the early morning of February 17, 1970, military police received a call for help from Captain MacDonald, a physician stationed at Fort Bragg, North Carolina. Upon arriving at the family's quarters, the police found Mrs.

MacDonald and the couple's two daughters clubbed and stabbed to death. MacDonald told the police that screams of his wife and six-year-old daughter awoke him from the couch in the living room. He said that during a short struggle four assailants stabbed him and knocked him unconscious. Upon regaining his senses, he attempted to revive his family and telephoned for help.

The military police, the Army's Criminal Investigation Division (CID), the F.B.I., and the Fayetteville, North Carolina, police department immediately began an investigation of the crime. Examination disclosed that each member of the MacDonald family had a different blood type. The location of the victims' blood in the apartment and the presence of one daughter's blood on MacDonald's glasses cast doubt on MacDonald's account. Similarly, the presence of stray fibers from his pajama top in the master bedroom did not correspond with MacDonald's statement that it was ripped in a struggle in the living room. Torn and bloody pieces of surgical gloves, apparently of a type kept by MacDonald, were found near the victims. Although there were numerous unidentified fingerprints in the apartment, no direct evidence of the alleged intruders was found. From these and other circumstances, investigators theorized that MacDonald had killed his family and staged the murder scene to cover up his crime.

On April 6, 1970, the CID questioned MacDonald and informed him that he was under suspicion. That same day he was relieved of his medical duties and restricted to quarters by his commanding officer. On May 1, 1970, the Army formally charged him with the murders.

Major General Edward M. Flanagan, Jr., Commanding General of the unit to which MacDonald was assigned, appointed Colonel Warren V. Rock to investigate the charges, with the assistance of a legal officer, in accordance with Article 32 of the Uniform Code of Military Justice. Colonel Rock's final report described the manner in which the Article 32 proceedings were conducted:

> "In view of the fact that both government and defense were represented by counsel, the hearing was conducted in generally the same format as a trial. Government presented its evidence and rested, defense did likewise and finally the Article 32 Officer called for witnesses and evidence. In all instances opposing counsel was given the full right of cross examination. It was necessary to give considerable latitude to counsel and permit the introduction of some hearsay-type evidence for both sides. The legal advisor sat next to the Investigating Officer throughout the hearing and his sole function was to assist him in making proper legal rulings on all questions that arose."

The government called 27 witnesses and MacDonald 29, including many character witnesses. He himself testified and was subjected to extensive cross-examination.

At the conclusion of the Article 32 proceedings, Colonel Rock filed an exhaustive report in which he recommended that "[a]ll charges and specifications against Captain Jeffrey R. MacDonald be dismissed because the matters set forth in all charges and specifications are not true. . . ." He also recommended that the civilian authorities investigate a named suspect. On review of Colonel Rock's report, General Flanagan dismissed the charges on October 23, 1970, and reported this to the Commanding General of Fort Bragg, who took no further action. Shortly afterward, the Army released MacDonald from quarters and, underscoring the finality of the military proceed- **[201]** ings, it granted him an honorable discharge for reasons of hardship in December 1970.[4]

Following MacDonald's discharge, the Department of Justice asked the CID to continue its investigation. The CID complied, conducting 699 interviews. At the request of the department, it sent the weapons and the victims' clothing to the F.B.I. laboratory in July 1971 and in August furnished the Treasury Department's laboratory other items for analysis. The CID completed its field investigation in December 1971, and in June 1972 it transmitted to the Justice Department a 13-volume report recommending prosecution. A number of government attorneys studied the report and asked for further investigations. The CID filed two supplemental reports, but upon receiving a request for additional investigation, it suggested convening a grand jury before it expended any more effort. Finally, in August 1974 the government started presenting the case to a grand jury. Concurrently, the F.B.I. examined several items from the MacDonald house, and it exhumed the bodies of Mrs. MacDonald and the children to obtain hair samples.

Shortly after his discharge, MacDonald moved to California where he resumed the practice of medicine. In 1971 he was again interviewed by the CID. Beginning in January 1972 and continuing through January 1974, MacDonald, first in person and then through letters by his attorneys, requested the government to complete its investigation. He repeatedly offered to submit to an interview by the government attorneys in charge of the case.[5] The attorneys, how-

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[4] MacDonald's discharge barred any further military proceedings against him. *United States ex rel. Toth v. Quarles,* 350 U.S. 11, 76 S.Ct. 1, 100 L.Ed. 8 (1955).

[5] For example, on March 27, 1973, MacDonald's attorney wrote an attorney in the criminal division of the Department of Justice:

> "I am taking the liberty to again urge upon you and the Justice Department to accept our offer to submit Dr. Mac-

ever, declined to question him and to advise when their investigation would be completed. The correspondence appears to have come to an end in January 1974, leaving MacDonald in suspense.[6] MacDonald was subsequently subpoenaed to appear before the grand jury. He waived his right to remain silent and testified on two occasions for a total of more than five days.

The grand jury indicted MacDonald on January 24, 1975. He was promptly arrested in California and a week later admitted to bail. He moved to have the indictment dismissed, contending that the government's delay in obtaining it

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Donald to an in depth on-the-record interview by your office. "It seems to me that there are mutual advantages to our suggestion. From the standpoint of your office it would present the opportunity to perhaps obtain answers to some of the questions that may have arisen in your minds as a result of the study of the record and investigative reports in this case. From our standpoint we believe that an interview with Dr. MacDonald can only confirm the correctness of the finding of the Army's own initial hearing officer, Colonel Rock."

[6] On January 8, 1974, MacDonald's counsel wrote:

> "It is with some reservations that I write this letter to you to inquire about the status of your Department's review of the investigation of the deaths of the MacDonald family at Ft. Bragg, North Carolina. However, in fairness to my client who has lived with the twin tragedies of those deaths and the unfounded suspicion of himself in connection with them, that I ask whether a final decision has been made in connection with any Federal criminal action against him. If such a decision has not yet been made may I inquire as to when we may reasonably expect it to be made.
>
> "I again renew to you our previously stated offer to submit Dr. MacDonald to full questioning by attorneys of the Department of Justice."

The chief of the General Crimes Section replied on January 23, 1974:

> "For your information, this case is under active investigation and will remain under consideration for the foreseeable future.
> "I do not believe it would serve any useful purpose at this time to accede to your request that Jeffrey MacDonald be questioned by attorneys from the Department of Justice."

denied him the right to a speedy trial. The district court denied the motion, holding that MacDonald's right to a speedy trial did not arise [202] until the government accused him of the crime by the return of the indictment in January 1975.[7]

III

To determine whether a person charged with crime has been denied a speedy trial in violation of the sixth amendment, it is necessary to weigh the conduct of both the prosecution and the defendant. *Barker v. Wingo,* 407 U.S. 514, 530, 92 S.Ct. 2182, 33 L.Ed.2d 101 (1972). Recognizing that this balance compels an ad hoc appraisal of each case, *Barker* identified four factors that must be considered. They are "[l]ength of delay, the reason for the delay, the defendant's assertion of his right, and prejudice to the defendant." 407 U.S. at 530, 92 S.Ct. at 2192. We will assess each separately.

Length of delay. The critical issue concerning this aspect of the case is the identification of the event, and consequently the date, marking the beginning of the delay. The district court accepted the government's position that MacDonald's right to a speedy trial arose only after he was indicted in January 1975. MacDonald acknowledges that no significant delay has occurred since then. He contends, however, that the delay commenced when the Army formally charged him with murder on May 1, 1970, and restricted him to quarters. The length of delay, therefore, depends entirely on whether the pre-indictment delay on which MacDonald relies is of constitutional significance.

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[7] In its order denying MacDonald's motion, the district court said:

> "By this motion [to dismiss the indictment for denial of the right to speedy prosecution and trial] the defendant takes the government to task for pre-indictment delay amounting to almost five years between the date of the crime on February 17, 1970, and the return of the indictment by the grand jury on January 25, 1975. The government has undertaken to justify the delay on the grounds that 'because of government bureaucracy' the facilities of the crime laboratory of the Federal Bureau of Investigation were not brought into the case until the grand jury was finally convened in August of 1974. The right to a speedy trial under the Sixth Amendment does not arise until a person has been 'accused' of a crime, and in this case this did not occur until the indictment had been returned. On the authority of *United States v. Marion,* 404 U.S. 307, 92 S.Ct. 455, 30 L.Ed.2d 468 (1971), the motion of defendant is denied."

In *United States v. Marion,* 404 U.S. 307, 92 S.Ct. 455, 30 L.Ed.2d 468 (1971), the Court held that a three-year delay between the commission of a crime and indictment did not infringe the right to a speedy trial. The defendants in that case, however, were not arrested or formally accused of crime until the return of the indictment. Noting this, the Court carefully avoided adopting a simplistic rule that pre-indictment delay is always immaterial. Instead, referring to the values which the speedy trial provision safeguards, the Court explained that arrest furnishes an alternative starting point for determining the length of delay. It said:

> "[I]t is readily understandable that it is either a formal indictment or information or else the actual restraints imposed by arrest and holding to answer a criminal charge that engage the particular protections of the speedy trial provision of the Sixth Amendment.
>
> "Invocation of the speedy trial provision thus need not await indictment, information, or other formal charge. . ." 404 U.S. at 320-21, 92 S.Ct. at 463.

Reiterating these principles in *Dillingham v. United States,* 423 U.S. 64, 96 S.Ct. 303, 46 L.Ed.2d 205 (1975), the Court held that even when the defendant has not shown actual prejudice, the time elapsing between arrest and indictment must be considered in appraising the alleged denial of a speedy trial. It is, therefore, essential to determine whether MacDonald's military arrest "engage[d] the particular protections of the speedy trial provision of the Sixth Amendment." *Marion,* 404 U.S. at 320, 92 S.Ct. at 463.

On May 1, 1970, MacDonald's commanding officer charged under oath that MacDonald, acting with premeditation, murdered his wife and two daughters. Simultaneously, the commanding officer [203] recommended trial by general court-martial.[8] The charge was the functional equivalent of a civilian arrest warrant, for under U.C.M.J. Article 10, 10 U.S.C. § 810, it subjected MacDonald to arrest or confinement.[9] Like its civilian equivalent, military arrest must be based on probable cause.[10] The status of an officer restricted

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[8] U.C.M.J. Art. 30, 10 U.S.C. § 830, provides:

"(a) Charges and specifications shall be signed by a person subject to this chapter under oath before a commissioned officer of the armed forces authorized to administer oaths and shall state—

(1) that the signer has personal knowledge of, or has investigated, the matters set forth therein; and

(2) that they are true in fact to the best of his knowledge and belief.

"(b) Upon the preferring of charges, the proper authority shall take immediate steps to determine what disposition should be made thereof in the interest of justice and discipline, and the person accused shall be informed of the charges against him as soon as practicable."

[9] U.C.M.J. Art. 10, 10 U.S.C. § 810, provides:

"Any person subject to this chapter charged with an offense under this chapter shall be ordered into arrest or confinement, as circumstances may require; but when charged only with an offense normally tried by a summary court-martial, he shall not ordinarily be placed in confinement. When any person subject to this chapter is placed in arrest or confinement prior to trial, immediate steps shall be taken to inform him of the specific wrong of which he is accused and to try him or to dismiss the charges and release him."

[10] U.C.M.J. Art. 9, 10 U.S.C. § 809, provides:

"(a) Arrest is the restraint of a person by an order, not imposed as a punishment for an offense, directing him to remain within certain specified limits. Confinement is the physical restraint of a person.

. . . . . .

"(c) A commissioned officer, a warrant officer, or a civilian subject to this chapter or to trial thereunder may be ordered to quarters under arrest differs from that of one who is simply restricted to quarters in lieu of arrest. The distinction depends on whether the accused is relieved of his military duties. He is considered to be restricted under arrest if relieved of his duties, and in lieu of arrest if he is not.[11] Because MacDonald was relieved of his duties, he was restricted to quarters under arrest.

As the government's counsel acknowledged at oral argument, had MacDonald been an enlisted man, he probably would have been confined in a stockade. While his restriction to the bachelor officers' quarters was undoubtedly more comfortable and less confining than imprisonment in a guard house, it was nevertheless a public act that seriously interfered with his liberty. He was relieved of his duties, his phone calls were logged by a military policeman, and he was placed under the surveillance of an escort officer whenever he left his quarters.

The government relies on *Wales v. Whitney,* 114 U.S. 564, 5 S.Ct. 1050, 29 L.Ed. 277 (1885), to support its argument that MacDonald's status was not analogous to that of a civilian who has been arrested. In *Wales,* the Medical Director of the Navy, who had been placed under arrest and restricted to the city of Washington, D.C., pending court-martial, sought a writ of habeas corpus to test the jurisdiction of the military court. The Supreme Court, noting that

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into arrest or confinement only by a commanding officer to whose authority he is subject, by an order, oral or written, delivered in person or by another commissioned officer. The authority to order such persons into arrest or confinement may not be delegated.

"(d) No person may be ordered into arrest or confinement except for probable cause."

[11] *See* ¶ 20 *a* and *b,* Manual for Courts-Martial (U.S. 1969 rev. ed.).

Washington was his place of duty, observed that "[i]t is not easy to see how he is under any restraint of his personal liberty, by the order of arrest, which he was not under before." The Court held that the physical restraint of the Medical Director was insufficient as a matter of fact, and the moral restraint imposed by the order was insufficient as a matter of law, to justify issuance of the writ. In reaching this conclusion, the Court pointed out that other procedures allowed the Medical Director to challenge the military court's jurisdiction, and consequently the denial of his petition did not deprive him of an adequate remedy.

We find the government's attempt to equate MacDonald's situation to Wales' unpersuasive. MacDonald's arrest is distinguished from Wales' by the greater limita- [204] tions placed on his liberty. Apart from this, "[n]otions of custody have changed" since 1885, *Strait v. Laird*, 406 U.S. 341, 351, 92 S.Ct. 1693, 32 L.Ed.2d 141 (1972) (Rehnquist, J., dissenting), and *Wales'* custody requirement for a writ of habeas corpus "may no longer be deemed controlling." *Hensley v. Municipal Court*, 411 U.S. 345, 350 n. 8, 93 S.Ct. 1571, 1574, 36 L.Ed.2d 294 (1973).

In any event, the standard employed by the Court in *Wales* to evaluate a restraint of liberty for the procedural requirements of habeas corpus provides an unsatisfactory measure to test the denial of the sixth amendment's guarantee to a speedy trial. The appropriate test is found in *Marion*, not *Wales*. MacDonald was subjected to "actual restraints imposed by arrest and holding to answer a criminal charge." *Marion*, 404 U.S. at 320, 92 S.Ct. at 463.[12]

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[12] The Assistant United States Attorney for the Eastern District of North Carolina, appearing for the government in the bail hearing before a magistrate for the United States District Court for the Central District of California, described MacDonald's status as follows:

It is these circumstances, as the Court points out, "that engage the particular protections of the speedy trial provision of the Sixth Amendment." *Marion*, 404 U.S. at 320, 92 S.Ct. at 463. We conclude, therefore, that MacDonald's military arrest was the functional equivalent of a civilian arrest allowing him to invoke the sixth amendment's guarantee of a speedy trial.

For the purpose of determining whether the sixth amendment applies, it is immaterial that, although the Army initially accused and arrested MacDonald, the civilian arm of the government is currently prosecuting him.[13] The prosecution of the same charge—murder—that the Army began was pursued by the Department of Justice. The sixth amendment, we hold, secures an accused's rights to a speedy trial against oppressive conduct by the government in its single sovereign capacity, regardless of the number and character of the executive departments that participate in the prosecution.

MacDonald's freedom from detention or bail during the interval between the termination of the Article 32 proceedings and his arrest after indictment did not, from a practical standpoint, dispel the effects of the government's initial accusation. MacDonald, of course, realized that the favorable conclusion of the Article 32 proceedings was not the

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"Back in the Article 32 hearing, he was in custody. He did have an officer with him, assigned to him, as Mr. Segal explained to you. He was, more or less, I believe they call it house arrest at the BOQ. And then, of course, once he was released on the charges, he was no longer required to have another Army officer with him. Shortly after that, he was discharged from the Service."

[13] We agree with the government that Fed.R.Crim.P. 48(b) did not control the military proceedings against MacDonald and thus was not applicable to him until his arrest by civilian authorities, *cf. Boeckenhaupt v. United States*, 392 F.2d 24 (4th Cir. 1968).

end of the government's efforts to convict him. Prudence obliged him to retain attorneys at his own expense for his continuing defense.[14] He remained under suspicion and was subjected to the anxiety of the threat of another prosecution.

The absence of imprisonment or bail does not always render inoperative the constitutional guarantee of a speedy trial.[15] [205] In *Klopfer v. North Carolina,* 386 U.S. 213, 87 S.Ct. 988, 18 L.Ed.2d 1 (1967), the Court held that the practice of nolle prossing an indictment with leave to reinstate it deprived an accused of his right to a speedy trial even though he was not confined or required to post bail. *Klopfer* differs from this case in one respect: there, an indictment remained potentially effective during the period of delay; here, MacDonald was not indicted until the end of the period. Apart from the absence of an indictment, MacDonald's situation bears a marked resemblance to Klopfer's. After formal arrest and charge, both men contested their accusations with the inconclusive result of Klopfer's mistrial and the dismissal of the charges against MacDonald after the Article 32 proceedings. The prosecution against both men, however, could have gone forward promptly—Klopfer's by retrial and MacDonald's by court-martial if the commanding general had rejected Colonel Rock's Article 32 report or if the United States Attorney had presented the case to a grand jury.[16] Nevertheless, neither man was held for trial. Consequently, Klopfer and MacDonald were free from imprisonment or the restraints of bail, but at all times they were subject to prosecution. Unlike defendants held pending trial, Klopfer and MacDonald were deprived of any forum in which to vindicate themselves. Most importantly, under the theory advanced by the state in *Klopfer* and by the federal government here, neither man would be safeguarded by the sixth amendment until the government, at its leisure, renewed the prosecution.

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[14] MacDonald alleges that his legal expenses for contesting the Army proceedings against him and for retaining counsel since then amount to $50,000. He estimates that expenses of trial would amount to an additional $250,000.

[15] Although the government acknowledges that the Speedy Trial Act of 1974 does not govern this case, it contends that the principles codified in 18 U.S.C. § 3161(h)(6) and its prototype, ABA, *Standards Relating to Speedy Trial* § 2.3(f) (App. draft 1968), should be applied to toll the running of time during the interval from the dismissal of the Army's charges against MacDonald in October 1970 to the return of the indictment in 1975. However, the tolling provision of § 3161(h)(6) must be read in conjunction with the entire Act, which sets fixed time limits after arrest, subject to certain exclusions, within which trial must take place. A single section of the Act should not be used outside of its statutory context as a standard for interpreting the sixth amendment, because the Act does not purport to mark the bounds of the sixth amendment's speedy trial clause. In contrast, *Barker v. Wingo,* 407 U.S. 514, 92 S.Ct. 2182, 33 L.Ed.2d 101 (1972), which eschews rigid time limits, provides the analysis which we must follow in determining whether the sixth amendment's guarantee has been violated.

Speaking of the purposes of the sixth amendment's speedy trial provision, the Court said in *United States v. Marion,* 404 U.S. 307, 320, 92 S.Ct. 455, 463 (1971):

> "Inordinate delay between arrest, indictment, and trial may impair a defendant's ability to present an effective defense. But the major evils protected against by the speedy trial guarantee exist quite apart from actual or possible prejudice to an accused's defense. To legally arrest and detain, the Government must assert probable cause to believe the arrestee has committed a crime. Arrest is a public act that may seriously interfere with the defendant's liberty, whether he is free on bail or not, and that may disrupt his employment, drain his financial resources, curtail his associa-

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[16] U.C.M.J. Arts. 18, 32-34, 10 U.S.C. §§ 818, 832-34; ¶¶ 34 and 35 Manual for Courts-Martial (U.S. 1969 rev. ed.); 18 U.S.C. §§ 1111 and 3231.

> tions, subject him to public obloquy, and create anxiety in him, his family and his friends. These considerations were substantial underpinnings for the decision in *Klopfer v. North Carolina ....*"

The considerations which the Court recognized as "substantial underpinnings" for affording Klopfer the protection of the sixth amendment apply also, we believe, to MacDonald, whose situation, viewed realistically, was similar to Klopfer's.

The delay between the accusation and detention of MacDonald and his indictment was more than four and one-half years. The Court described a five-year delay as "extraordinary" in *Barker,* 407 U.S. at 533, 92 S.Ct. 2182, and in *United States v. Macino,* 486 F.2d 750 (7th Cir. 1973), a 28-month delay between arrest and indictment was considered excessive. We conclude, therefore, that the delay in MacDonald's case is sufficiently long to justify "inquiry into the other factors that go into the balance" of assessing MacDonald's claim that he has been denied a speedy trial. *Barker,* 407 U.S. at 530, 92 S.Ct. 2182.

The reason for the delay. *Barker* teaches that the weight to be given delay varies with the government's reasons. Deliberate delay to hamper the defense must be weighed heavily against the government, and valid reasons such as a missing witness serve to excuse the delay. Neither of these [206] extremes applies to MacDonald's case, which appears to fall in a middle ground. Speaking of this, the Court said that a "neutral reason such as negligence or overcrowded courts should be weighed less heavily but nevertheless should be considered since the ultimate responsibility for such circumstances must rest with the government rather than with the defendant." 407 U.S. at 531, 92 S.Ct. at 2192.

There are several identifiable phases of delay and the reasons for them differ. During the initial period, the 1970 Army investigation and Article 32 proceeding, MacDonald was being prosecuted, so the inaction of civilian authorities was justified. For the next 18 months, at the request of the Department of Justice, the CID conducted another extensive investigation. Since the charges had been previously dismissed for insufficient evidence, the civilian prosecutors understandably desired a new investigation before bringing MacDonald to trial. The investigators were not dilatory and the case is complex, so this delay should not be weighed heavily against the government. *See Barker*, 407 U.S. at 531, 92 S.Ct. 2182.

The CID's report, along with its recommendation to prosecute, was transmitted to the Department of Justice in June 1972, more than two years before the commencement of grand jury proceedings. The government has not provided any satisfactory explanation for this two-year hiatus. It suggests that the need for further investigation and for its attorneys to become familiar with the case justifies the delay. But no significant new investigation was undertaken during this period, and none was pursued from August 1973 until the grand jury was convened a year later. Moreover, the United States Attorney was familiar enough with the case to recommend prosecution and specify his need for an additional attorney in the summer or fall of 1973. There is no indication in the record that the delay during this period was "inevitable" because of "[c]rowded dockets, the lack of judges or lawyers," or any other factor which might mitigate the government's failure to bring MacDonald to trial promptly after the CID completed its report in June 1972. *See Dickey v. Florida*, 398 U.S. 30, 38, 90 S.Ct. 1564, 26 L.Ed.2d 26 (1970). The leisurely pace from June 1972 until the indictment was returned in January 1975 appears to have been primarily for the government's convenience.[17] The Assistant United States Attorney for the Eastern District of North Carolina, who is familiar with the case, expressed an even harsher assessment of the delay. He told the magistrate at the bail hearing that the tangible evidence had been known to the government since the initial investigation in 1970 but that it had not been fully analyzed by the F.B.I. until the latter part of 1974. He explained that the F.B.I. analysis was tardy "because of government bureaucracy."[18] Whether one attributes the delay [207] from mid-1972, when the CID recommended prosecution, until the indictment was returned in January 1975 to indifference, negligence, or ineptitude, it must be weighed against the government. *Barker,* 407 U.S. at 514, 92 S.Ct. 2182; *Dickey v. Florida,* 398 U.S. 30, 90 S.Ct. 1564, 26 L.Ed. 2d 26 (1970). We turn, therefore, to the third factor prescribed by *Barker,* an appraisal of MacDonald's conduct.

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[17] The government may have proceeded on the erroneous assumption that no matter how much time elapsed between prosecutions, the pre-indictment delay would be of no consequence. But a mistake of law affords no justification for depriving an accused of sixth amendment rights. *Dickey v. Florida*, 398 U.S. 30, 90 S.Ct. 1564, 26 L.Ed.2d 26 (1970).

[18] During the course of the government's summation at the bail hearing, the Assistant United States Attorney and the Magistrate engaged in the following colloquy:

ASSISTANT UNITED STATES ATTORNEY: Your Honor, there is, I am sure, some question about the five-year period of time in here. This case has been investigated over a five-year period of time. It was not until very recently that the FBI Laboratory came into the case. Previously, the investigation of the case from a scientific viewpoint was by the Army CID Lab.

At the time of the Article 32 hearing in 1970 when Dr. MacDonald was released from the Army charges, much of the scientific evidence that I've made available to you today was not available to the hearing officer at that time.

THE MAGISTRATE: But this evidence has been gone over—this evidence is four or five years old now . . .

ASSISTANT UNITED STATES ATTORNEY: Yes. The evidence with regard to the pajama top, the bath mat and the sheet: All that evidence has been produced within the last five months by the FBI Lab.

THE MAGISTRATE: But that evidence—the analysis of that evidence was within the last five months, is that correct?

ASSISTANT UNITED STATES ATTORNEY: Yes, sir. The evidence was in existence the whole time: The bloody sheet, the bath mat and the—

THE MAGISTRATE: The time—three to four years passed between the creation of the evidence and its analysis?

The defendant's assertion of his right. In *Barker* the Supreme Court observed that some defendants may wish to delay trial in expectation of the prosecution's case becoming stale. 407 U.S. at 521, 92 S.Ct. 2182. At the same time, it rejected a strict "demand-waiver" approach that requires a defendant to assert the right or lose it. 407 U.S. at 524-29, 92 S.Ct. 2182. It recognized, however, that an important factor in deciding a claim that a defendant has been denied a speedy trial is whether he wanted one and made his demands known to the prosecution. 407 U.S. at 531-32, 92 S.Ct. 2182.

MacDonald has by no means delayed the prosecution of his case. While he was in the Army, and afterwards, he gave statements to the CID. He testified under cross-examination in the Article 32 hearing and offered to submit himself to questioning by attorneys in the Department of Justice. Additionally, he waived immunity and testified before the grand jury.

MacDonald also has consistently expressed a desire to have the case resolved. He first attempted to expedite a

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ASSISTANT UNITED STATES ATTORNEY: That's correct.
THE MAGISTRATE: Very well.
ASSISTANT UNITED STATES ATTORNEY: We were not—Because the FBI Lab, because of Government bureaucracy, did not come into the case, and we were unable to get them into the case until the beginning of this Grand Jury.

Prior to that time, the Army CID Lab out of Fort Gordon handled it, and they do not have the sophistication that the FBI Lab has, and they will admit that.

decision in January 1972. Later, his attorneys wrote the department several letters inquiring about a final decision on the prosecution to relieve "the unfounded suspicion" to which MacDonald was subjected.[19] A person in his position who has been arrested but not indicted is under no compulsion to demand prosecution in order to preserve his right to a speedy trial, for the primary responsibility for bringing cases to trial rests on the government. *United States v. Macino,* 486 F.2d 750 (7th Cir. 1973); *cf. Barker,* 407 U.S. at 529, 92 S.Ct. 2182. Both the facts and the law, therefore, warrant the conclusion that MacDonald reasonably asserted his right to a speedy trial. In accordance with *Barker,* his assertion "is entitled to strong evidentiary weight in determining whether [he] is being deprived of the right." 407 U.S. at 531-32, 92 S.Ct. 2182, 2192.

Prejudice to the defendant. An affirmative demonstration of prejudice is unnecessary to prove a denial of the right to a speedy trial. It is, however, one of the factors a court must weigh in adjudicating the accused's claim. *Moore v. Arizona,* 414 U.S. 25, 94 S.Ct. 188, 38 L.Ed.2d 183 (1973); *Barker,* 407 U.S. at 533, 92 S.Ct. 2182. The Court has said the sixth amendment's guarantee of a speedy trial is "an important safeguard to prevent undue and oppressive incarceration prior to trial, to minimize anxiety and concern accompanying public accusation and to limit the possibilities that long delay will impair the ability of an accused to defend himself." *United States v. Ewell,* 383 U.S. 116, 120, 86 S.Ct. 773, 776, 15 L.Ed.2d 627 (1966). Prejudice, therefore, should be assessed in the light of these interests. *Barker,* 407 U.S. at 532, 92 S.Ct. 2182.

MacDonald was not imprisoned or subject to bail from October 1970 until January 1975, but his freedom to come and go is not decisive. An accused person who [208] is not restrained may nonetheless be prejudiced. *Klopfer v. North Carolina,* 386 U.S. 213, 221, 87 S.Ct. 988, 18 L.Ed.2d 1 (1967). MacDonald has had to live with the constant threat of a new prosecution. He has been required to retain counsel at his own expense, and he has suffered anxiety concerning the unresolved nature of the case. These personal concerns are significant elements of prejudice. *United States v. Marion,* 404 U.S. 307, 320, 92 S.Ct. 455, 30 L.Ed.2d 468 (1971).

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[19] Extracts from some of the letters are quoted in notes 5 and 6 *supra.*

Also, MacDonald's claim that his ability to defend himself has been impaired is not unfounded. Most of his witnesses who were in the Army in 1970 have scattered across the country. Even if the government provides the defense with current addresses, interviewing these witnesses before trial and insuring their presence at trial would be time-consuming and expensive. Moreover, in the five years since the murders, memories have faded and witnesses can no longer be expected to reliably recall details.

Such potential memory loss is critical in this case, since a detailed reconstruction of the murder scene is an element of the government's case. The position of a flowerpot, the way MacDonald's pajama top was folded, the condition of the sheets in the bedroom, are but examples of the many questions about physical evidence that the government's case turns on. In one instance, the government contended at the Article 32 hearing that an overturned coffee table lying on its side showed that the murder scene was staged, since the table was top-heavy and would have turned completely over if kicked in a scuffle. When the Article 32 officer visited the scene and kicked the table over, however, it struck a chair and landed on its side. Thus, the exact position of the chair is important in determining whether MacDonald staged the murders as the government charges.

The prosecution emphasizes that all of the testimony at the Article 32 hearing and the statements made to investigators since then have been kept and may be used to refresh memories. Yet this in itself illustrates the prejudice to MacDonald. A stale witness, forced to rely on statements made half a decade previously, cannot be as effective as one actually remembering what he saw. Since the details of any witness's testimony may change over five years, the adverse inference a jury might draw from the government's use of its old records to impeach defense witnesses cannot be overlooked.

In sum, applying the principles of *United States v. Marion,* 404 U.S. 307, 320-21, 92 S.Ct. 455, 30 L.Ed.2d 468 (1971), we conclude that for the purposes of determining whether MacDonald was denied his right to a speedy trial, the Army's formal accusation and detention on May 1, 1970, entitled him to invoke the protection of the sixth amendment. *See Dillingham v. United States,* 423 U.S. 64, 96 S.Ct. 303, 46 L.Ed.2d 205 (1975). Weighing the factors specified by *Barker v. Wingo,* 407 U.S. 514, 92 S.Ct. 2182, 33 L.Ed.2d 101 (1972), we believe that the delay—even if the period from May 1, 1970, to June 30, 1972, is wholly excluded as excusable—was of sufficient length to be "presumptively prejudicial." 407 U.S. at 530, 92 S.Ct. 2182. The delay, therefore, necessitates inquiry into the other factors of the balance. The government has furnished no satisfactory explanation for the delay from the end of June 1972 until the grand jury was convened in August 1974, so this time must be weighed against it. MacDonald, on the other hand, neither contributed to this delay nor acquiesced in it, so his conduct weighs heavily in his favor. Finally, it is apparent from the record that MacDonald has been prejudiced by the formal accusation and arrest of May 1970, by anxiety arising out of the delayed resolution of this charge, and by the impediment to his defense that scattered witnesses and dimmed memories inevitably cause. Weighing all of these factors, we conclude that the government has denied MacDonald a speedy trial as guaranteed by the sixth amendment and that the prosecution must be dismissed. *Strunk v. United States,* 412 U.S. 434, 93 S.Ct. 2260, 37 L.Ed.2d 56 (1973).

[209] IV

We find no error in the district court's rulings concerning the composition of the grand jury, alleged prosecutorial misconduct, and the denial of motions for discovery and suppression of evidence.

MacDonald claims that General Flanagan's acceptance of his exoneration in the Article 32 hearing collaterally estops the government from prosecuting him again. Alternatively, he argues that the second prosecution places him in double jeopardy. The government argues, however, that the Article 32 proceedings did not place MacDonald in jeopardy since only a court-martial, which was never convened, could have convicted him. Decision of this aspect of the case depends largely on the legal effect of the acceptance of an Article 32 recommendation by the commanding officer. It appears that custom imputes finality to the commanding officer's decision. This would arguably sustain a plea of collateral estoppel, if not double jeopardy, but no military regulation or case specifically deals with this question. In view of the unsettled state of this point of military law and of our disposition of the case under the speedy trial provision of the sixth amendment, we find it unnecessary and imprudent to render an opinion, which would in effect be advisory, on an issue of general importance to military law.

The case is remanded with directions to dismiss the prosecution with prejudice because of the government's failure to accord MacDonald a speedy trial as required by the sixth amendment.

CRAVEN, Circuit Judge (dissenting):

My brothers hold that the sixth amendment compels the dismissal of the *only* prosecution ever begun against Dr. MacDonald. One need know very little about military law to understand that a charge of homicide can be disposed of finally only by court-martial. None was ever convened. Instead, the Army, pursuant to Article 32, Uniform Code of Military Justice,[1] simply conducted a "thorough and impartial investigation" to determine whether the charge might be referred to a general court-martial, and concluded that the evidence was insufficient to justify the convening of a general court. It is true that the hearing was protracted and made newspaper headlines. But it is also true, it seems to me (my brothers do not reach the question), that Captain MacDonald has never been put to trial by either a civil or military court. What happened to him in the Army is the substantial equivalent of an open grand jury proceeding resulting in the failure to return a true bill, and that is all.[2]

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[1] 10 U.S.C. § 832.

[2] My brothers premise their analysis on an application of a civilian court of the sixth amendment speedy trial guarantee to events which occurred while MacDonald was in the military.

That the sixth amendment's speedy trial guarantee applies to the military is an appealing assumption but should be recognized as such. The criminal trial provisions of both the fifth and sixth amendments are clearly aimed at procedure in the civil courts. The fifth expressly excludes cases arising in the land or naval forces from prosecutions requiring grand jury indictment, and it is settled that neither the fifth nor sixth amendments can "be taken to have extended the right to demand a jury to trials by military commission . . . ." *Ex Parte Quirin*, 317 U.S. 1, 40, 63 S.Ct. 1, 17, 87 L.Ed. 3 (1942). It is true that the Supreme Court once assumed the application of the double jeopardy clause of the fifth amendment in a military context, but in doing so it is significant that it denied relief. *Wade v. Hunter*, 336 U.S. 684, 69 S.Ct. 834, 93 L.Ed. 974

My brothers hold that the sixth amendment's guarantee of the right to a speedy trial as interpreted by the Supreme Court [210] in *Marion*,[3] *Barker*,[4] and *Dillingham*,[5] is triggered by the Army proceedings. I think not and respectfully dissent.

I.

In *Marion* the Supreme Court defined the point at which the sixth amendment becomes applicable:

> On its face, the protection of the Amendment is activated only when a criminal prosecution has begun and extends only to those persons who have been *"accused"* in the course of that prosecution. These provisions would seem to afford no protection to those not yet accused, nor would they seem to require the Government to discover, investigate, and accuse any person within any particular period of time.

404 U.S. at 313, 92 S.Ct. at 459 (emphasis added).

It is now settled that a civilian becomes an "accused" when he is arrested and charged with a crime. This is so, the Supreme Court tells us, because:

(1949). I think my brothers' decision would rest on firmer ground if it were pitched on the fundamental fairness doctrine implicit in the due process clause, which has been applied time and again to an infinite variety of matters not restricted to criminal procedure in the civilian courts, as is, I think, the sixth amendment right to speedy trial. *See generally, O'Callahan v. Parker*, 395 U.S. 258, 272-73, 89 S.Ct. 1683, 23 L.Ed.2d 291 (1969); *Kinsella v. Krueger*, 351 U.S. 470, 474, 76 S.Ct. 886, 100 L.Ed. 1342 (1956); *Duncan v. Kahanamoku*, 327 U.S. 304, 309, 66 S.Ct. 606, 90 L.Ed. 688 (1946); *Burns v. Lovett*, 91 U.S. App.D.C. 208, 202 F.2d 335, 341-42 (1952), *aff'd sub nom., Burns v. Wilson*, 346 U.S. 137, 73 S.Ct. 1045, 97 L.Ed. 1508 (1953).

[3] *United States v. Marion*, 404 U.S. 307, 92 S.Ct. 455, 30 L.Ed.2d 468 (1971).

[4] *Barker v. Wingo*, 407 U.S. 514, 92 S.Ct. 2182, 33 L.Ed.2d 101 (1972).

[5] *Dillingham v. United States*, 403 U.S. 64, 96 S.Ct. 303, 46 L.Ed.2d 205, 44 U.S.L.W. 3327 (U.S., Dec. 1, 1975).

> To legally arrest and detain, the Government must assert probable cause to believe the arrestee has committed a crime. Arrest is a public act that may seriously interfere with the defendant's liberty, whether he is free on bail or not, and that may disrupt his employment, drain his associations, subject him to public obloquy, and create anxiety in him, his family and his friends.

Marion, supra at 320, 92 S.Ct. at 463. *See Dillingham v. United States*, 403 U.S. 64, 96 S.Ct. 303, 46 L.Ed.2d 205 (1975) (quoting *Marion*).

Thus, "it is either a formal indictment or information or else the actual restraints imposed by arrest and holding to answer a criminal charge that engage the particular protections of the speedy trial provision of the Sixth Amendment." *Dillingham, supra; Marion, supra.*

It is significant to me that the Court equates "either a formal indictment . . . or else the actual restraints imposed by arrest . . . to answer a criminal charge . . . ." It does *not* suggest that the amendment is triggered when the prosecutor presents the bill to the grand jury. Instead, the period of time for measuring the speed of the trial runs from the return of a true bill into the court. Charge is not enough. At most, Dr. MacDonald was "charged." Also, under the specific language of *Marion*, I do not believe the sixth amendment's speedy trial guarantee would be brought into play by an arrest without warrant by a federal drug enforcement officer, for example, if, upon presentation to a magistrate, the arrestee were released because no probable cause was shown. I do not believe my brothers would contend otherwise.[6]

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[6] I note that Dillingham was arrested on a warrant. *United States v. Palmer*, 502 F.2d 1233, 1234 (5th Cir. 1974), *rev'd sub nom. Dillingham v. United States*, 403 U.S. 64, 96 S.Ct. 303, 46 L.Ed.2d 205, 44 U.S.L.W. 3327 (1975).

My analysis of the facts of this case is that the procedure in which MacDonald was involved falls somewhere between an unsuccessful presentation to a grand jury and an arrest and subsequent release because of a failure to demonstrate probable cause for the arrest. Neither, I believe, warrants an application of the sixth amendment's speedy trial guarantee.[7]

MacDonald was charged with the murder of his wife and children by Colonel Francis Kane, his immediate commander. These charges were preferred under Article 30 [211] U.C.M.J.[8] That article makes clear that a finding of "probable cause" is not required to "charge" an individual under the Code.[9] Indeed, anyone subject to the U.C.M.J. can prefer charges against anyone else who is also under the Code.[10] A determination of probable cause, or its "functional equivalent," is only made under military procedure at the Article 32 proceedings.[11]

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[7] This case differs from both my examples in that during these proceedings MacDonald was neither as free from restraints as a person under grand jury investigation nor as restricted as someone under civilian arrest. *See* part II, *infra.*

[8] 10 U.S.C. § 830.

[9] Article 30 reads as follows:

> (a) Charges and specifications shall be signed by a person subject to this chapter under oath before a commissioned officer of the armed forces authorized to administer oaths and shall state—
>
> (1) that the signer has personal knowledge of, or has investigated, the matters set forth therein; and
>
> (2) that they are true in fact to the best of his knowledge and belief.
>
> (b) Upon the preferring of charges, the proper authority shall take immediate steps to determine what disposition should be made thereof in the interest of justice and discipline, and the person accused shall be informed of the charges against him as soon as practicable.

[10] ¶ 29b, Manual for Courts-Martial (U.S. 1969 rev. ed.).

[11] Article 32, 10 U.S.C. § 832 reads in relevant part:

> (a) No charge or specification may be referred to a general court-martial for trial until a thorough and impartial investi-

In MacDonald's case, at the close of the Article 32 proceedings Major General Edward M. Flanagan, Jr., acting on the report of Colonel Warren V. Rock, who presided at those proceedings, dismissed the charges because "[i]n [his] opinion, there [was] insufficient evidence available to justify reference of the charges to trial by court-martial."

It is therefore clear that no finding of probable cause was made in Dr. MacDonald's case at the Article 32 proceedings. My brothers are of the view, however, that we should presume such a finding was made because it should have been made prior to "arrest" under 10 U.S.C. § 810.

Whether a finding of probable cause was made is a question of fact. If there were such a finding I should think it would be supported by the record, but the majority makes no reference to any orders, either written or oral, to indicate that a finding of probable cause was made. We are not told when the finding was made, who made it, or what procedures he followed in doing so. Instead, as I have said, a presumption is created.

First, my brothers reason that since MacDonald was relieved of his duties, his status must be that of "arrest" rather than "restriction to quarters in lieu of arrest." Secondly, they correctly note that under 10 U.S.C. § 810 MacDonald was subject to arrest or confinement when charged with the murders by Colonel Kane on May 1. And finally, they infer that since 10 U.S.C. § 809 purports to require that

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gation of all the matters set forth therein has been made. This investigation shall include inquiry as to the truth of the matter set forth in the charges, consideration of the form of charges, and a recommendation as to the disposition which should be made of the case in the interest of justice and discipline.

all arrests be supported by probable cause that probable cause must have been found in MacDonald's case.

I do not believe it is necessarily the case that because MacDonald was relieved of his duties, he was arrested. I read Paragraphs 20a and b of the Manual for Courts-Martial only to say that an officer under "arrest" may not be required to perform his duties and that an officer restricted to quarters in lieu of arrest may be required to do so. These two provisions do not forbid the Army from relieving one restricted to his quarters of any or all of his duties. That MacDonald was relieved of all duties is not, I believe, conclusive as to this status.

I agree with my brothers, as I have previously said, that MacDonald was subject to arrest or confinement under 10 U.S.C. § 810 when charged with homicide. But I cannot agree that the power to do a thing requires a finding that it was done. Whatever the logic of such a presumption, I believe Paragraph 18b of the Manual of Courts-Martial destroys it for that paragraph explicitly states that the arrest and confinement pro- [212] visions, although couched in terms of requirements, are "not mandatory and [their] exercise rests within the discretion of the person vested with the power to arrest or confine."[12]

I think the Manual of Courts-Martial will take us just so far and that we are driven back to the facts, and the facts are that Dr. MacDonald was verbally restricted to quarters by Colonel Kane on April 6, 1970, and there is nothing whatsoever in the record to suggest any change in his status when he was formally charged on May 1. If MacDonald was ever arrested it must have been on April 6 when he was first restricted to quarters and his duties lifted, and on that date I do not believe that anyone suggests the existence of probable cause for arrest, let alone a specific finding to that effect.[13]

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[12] b. Basic consideration. (1) Any person subject to the code accused of an offense under the code shall be ordered into arrest or confinement, as circumstances may require; but when accused only of an offense normally tried by a summary court-martial, he shall not ordinarily be placed in confinement (Art. 10). The foregoing provision is not mandatory and its exercise rests within the discretion of the person vested with the power to arrest or confine. No restraint need be imposed in cases involving minor offenses. A failure to restrain does not affect the jurisdiction of the court.

My brothers and I agree, I think, that arrest without more is not enough to trigger the sixth amendment. There must be a lawful arrest, *i.e.*, with probable cause. It is fair to say, I think, that there is not one word in the record to even suggest that anyone, much less the equivalent of an impartial magistrate, ever purported to find probable cause to arrest Dr. MacDonald. I believe we can be fairly sure that this is the first instance in the long history of the doctrine of probable cause in which a court has assumed that there must have been such a finding because it should have been made.

Finally, I cannot agree with my brothers that Colonel Kane's charge was the functional equivalent of a civilian arrest warrant. I am not sure to what it should be equated, but it is equally plausible to view it as the functional equivalent of the complaint of the prosecutor who then must seek an arrest warrant from an impartial magistrate.

Based on the above analysis I believe it is clear that a finding of probable cause was *never* made in Dr. MacDonald's case. Unless we ignore as surplusage the Supreme Court's language in *Marion*, which it repeated in *Dillingham*, that to "arrest and detain, the Government must assert probable cause to believe the arrestee has committed a crime," I do not understand how this case can be fitted within the rule of law established by those cases. Furthermore, I do not believe that the policy underpinnings of *Marion* allow us to ignore the significance of a finding of probable cause. The Supreme Court concentrated on the impact of the public act of arrest on the defendant. I believe that fundamental to that impact is the fact that, in the civilian arrest context with which *Marion* was concerned, an arrest must be supported by probable cause. With reference to public obloquy, contrast instead, what happened to Dr. MacDonald: after the equivalent of the return of "not a true bill," he was honorably discharged. I, therefore, think that Dr. MacDonald's case is clearly distinguishable from any of the cases cited by the majority.

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[13] All the majority tells us about that event is that on April 6 the CID informed MacDonald that "he was under suspicion." At 200. I find nothing in their treatment of this encounter nor anything in the record to indicate that on that day probable cause was found.

My brothers find this case to closely parallel *Klopfer v. North Carolina,* 386 U.S. 213, 87 S.Ct. 988, 18 L.Ed.2d 1 (1967), differing from it in only one respect: "there an indictment remained potentially effective during the period of delay; here, MacDonald was not indicted until the end of the period."[14] I agree that that is the major difference between the cases, but I find the distinction to constitute the centerpiece of the Supreme Court's holding in that case [213] that Klopfer's sixth amendment rights had been violated.

> The pendency of the indictment may subject him to public scorn and deprive him of employment, and almost certainly will force curtailment of his speech, associations and participation in unpopular causes. By indefinitely prolonging this oppression, as well as the "*anxiety and concern accompanying public accusation,*" the criminal procedure condoned in this case by

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[14] At 205.

> the Supreme Court of North Carolina clearly denied the petitioner the right to a speedy trial which we hold is guaranteed to him by the Sixth Amendment of the Constitution of the United States.

386 U.S. at 222, 87 S.Ct. at 993 (footnote omitted and emphasis added).

During this four-year period MacDonald stood under no "public accusation." The charges had been dismissed by the Army, and this action was made irrevocable by his discharge from the Army. I find this claim therefore to be one of double jeopardy, which I do not believe is meritorious, and which issue my brothers do not reach.

II.

Under my brothers' reasoning, we must determine that military arrest is the functional equivalent of civilian arrest for the purposes of triggering the right to a speedy trial. I conclude that MacDonald was never "arrested" in the sense required under *Marion.*

MacDonald was restricted to his room in the Bachelor Officers' Quarters.[15] An armed MP was placed outside his door. An escort officer accompanied him when he left the quarters.[16] While *Wales v. Whitney*, 114 U.S. 564, 5 S.Ct.

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[15] The majority opinion attaches significance to the fact that had MacDonald been an enlisted man he would have probably been confined in the stockade. At 203. The fact is that he was an officer and was not so confined.

[16] The government describes MacDonald's restrictions as follows:

> He was to remain in his room except when he was visiting his lawyers, dining at the officers club, or making parachute jumps for pay qualification purposes. The general, though unenforced, limitation on Captain MacDonald's movement was the requirement that he be accompanied by an escort

1050, 29 L.Ed. 277 (1885) is, as my brothers say, no longer the law as to the degree of "confinement" necessary to support issuance of a writ of habeas corpus, I believe it is fully applicable to the majority's search for the functional equivalent of a civilian arrest. In that respect, I believe it is still sound precedent and demands a conclusion that MacDonald was not in a civilian sense under the "actual restraints required by arrest and holding to answer to a criminal charge."

In *Wales* a Navy officer who had been ordered to appear for trial at general court-martial was given the following order by the Secretary of the Navy: "You are hereby placed under arrest, and you will confine yourself to the limits of the City of Washington." 114 U.S. at 566, 5 S.Ct. at 1051. While the majority may be correct that the cases differ with respect to "the greater limitations placed on [MacDonald's] liberty,"[17] I believe, like those in *Wales*, the restraints imposed on MacDonald did not constitute "actual confinement or the present means of enforcing it." 114 U.S. at 572, 5 S.Ct. at 1053. The restraints were, under the Supreme Court's terminology, simply "moral." As I read *Wales*, the critical point was not that the petitioner in that case was free to walk the streets of Washington, D. C., alone. The Supreme Court focused on the fact that if he had

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> officer while on post. He was permitted to sun bathe in the vicinity of the BOQ, to play golf on post, to attend the post chapel as well as the post theatre, post liquor (Class VI) store, commissary, post exchange and the bowling alley.

Brief for Appellee at 5-6.

In the context of the military where a person is subject normally to the orders of his superiors, I do not find this the type of serious "interfere[nce] with his liberty" which I believe brings the right to speedy trial into play.

[17] At 203-204.

wished to leave the District, he was free to do so, "[a]nd though it is said that a file of marines or some proper officer could have been sent to arrest, and bring him back, this [214] could only be done by another order of the secretary, and would be another arrest, and a real imprisonment under another distinct order." 114 U.S. at 572, 5 S.Ct. at 1054.

Neither side has provided this court with the orders directed to MacDonald or others concerning his restriction to quarters. At oral argument, however, we were told by the government attorney arguing the case that the MP stationed outside MacDonald's door was given specific instructions *NOT* to stop him if he tried to leave. The escort officer who accompanied MacDonald, according to my understanding of the facts, was not armed. I find nothing in the record to indicate that his orders included a direction to stop MacDonald from any conduct he undertook. I therefore find the present case indistinguishable from *Wales*. Any actual confinement would have required an additional order, and there was therefore no "actual confinement or the present means of enforcing it." *Wales, supra* at 572, 5 S.Ct. at 1053.

III.

Having concluded that the sixth amendment's guarantee of speedy trial does not apply in MacDonald's case, he may still prevail if it were found that the delay violated his right to due process under the fifth amendment. *See, e. g., Marion, supra*, 404 U.S. at 324, 92 S.Ct. 455; *Ross v. United States*, 121 U.S.App.D.C. 233, 349 F.2d 210 (1965). But to grant relief under the fifth amendment requires a showing of substantial prejudice, and I find none. *Id.*

The majority finds prejudice in the fact that MacDonald's witnesses, as Army personnel, have scattered around the world with resulting difficulty in locating them and conducting pretrial interviews. In addition, my brothers agree with MacDonald's argument that the memories of these witnesses will be dulled by time. But all that is speculative. In a wholly circumstantial type of case, it is improbable that guilt or innocence will turn upon accurate recollection of the facts. It is not suggested that any defense witness who knows the truth now cannot be produced, or if found, cannot now remember what he once knew.

But if it be assumed that these factors may supply the requisite prejudice under the sixth amendment's more specific guarantees, I do not believe they require dismissal of the indictment under the fifth amendment's guarantee of due process. Certainly that question need not be anticipated, and could best be left for determination at trial.

I would affirm.

Appendix "B"

CHRONOLOGY OF EVENTS

February 17, 1970	The assaults on the MacDonald family.
April 6, 1970	MacDonald is advised he is a suspect and is restricted to quarters.
April, 1970	Justice Department begins monitoring the prosecution.
May 1, 1970	MacDonald is formally charged with the murders of his family and is placed under armed guard.
May 12, 1970	Investigating Officer is appointed, pursuant to UCMJ Article 32, to determine whether the charges should be referred to trial.
July 6, 1970	Article 32 proceedings begin. Government prosecutors state that they are ready to proceed with the case against MacDonald.
October 13, 1970	Investigating Officer submits his report containing two ultimate findings: the charges against MacDonald are "not true," and there is evidence warranting an investigation of Helena Stoeckley for complicity in the crime.
October 23, 1970	The military charges are dismissed.
December 5, 1970	MacDonald is honorably discharged from the Army.

January, 1971	Justice Department asks the Army CID to conduct a reinvestigation of the case.
December, 1971	CID reinvestigation is completed.
January, 1972	MacDonald requests the Justice Department to complete its review of the case. These requests are renewed a number of times between this date and January, 1974.
June, 1974	Justice Department attorney is assigned to prepare the case for submission to a grand jury.
August, 1974	Grand jury testimony begins. MacDonald is the first witness and testifies for four days.
January 24, 1975	Grand jury returns indictment against MacDonald.

Appendix "C"

The following story was transmitted by the Associated Press on January 9, 1981. It is based on a copyrighted story in the Fayetteville Times.

Fayetteville (AP) A woman who claims to have witnessed the slayings of former Green Beret physician, Jeffrey R. MacDonald's wife and two children in 1970 said MacDonald was a victim, not the murderer.

In a copyrighted story published today, The Fayetteville Times quoted Helena Stoeckley as saying MacDonald's family was killed by members of a witchcraft cult bent on revenge because MacDonald had "been giving drug users a hard time. . . ."

MacDonald, who now lives in Huntington Beach, Calif., was convicted in federal court in Raleigh in August 1979 of one count of first degree murder and two counts of second degree murder in the beating and stabbing deaths of his wife, Colette, 26, and their daughters, Kimberly, 5, and Kristen, 2, at their Army base home at Fort Bragg.

The 4th U.S. Circuit Court of Appeals overturned that conviction in 1980, ruling his right to a speedy trial had been violated. The government has until Feb. 17 to appeal that decision.

MacDonald, who required medical attention for stab wounds in the chest as a result of the 1970 incident, has maintained that his wife and daughters were killed by three men accompanied by a woman dressed in a floppy hat with long blonde hair, wearing boots and carrying a lighted candle. The prosecution has contended that MacDonald's wounds were self-inflicted.

Ms. Stoeckley told the newspaper she was the woman in the floppy hat. The newspaper also said she named the others allegedly involved in the deaths.

In the past government spokesmen have contended that remarks made by Ms. Stoeckley tending to involve her in the murders were allusions [sic] she manufactured because her attire matched the description given by MacDonald.

She was called as a witness at MacDonald's trial, but testified she could not recall being at the MacDonald home. U.S. District Judge Franklin T. Dupree Jr., the judge at MacDonald's trial, subsequently referred to her as "a person whose mind is far impaired" who "remains in a constant state of hallucinations."

The Times quoted Ms. Stoeckley as saying she did not tell her story in court because she was frightened.

Ms. Stoeckley said she was talking now because "I was tired of living with this thing. I was in a private hell. I'd like to see this resolved in the right manner. It seems like, until now, no one has the blame for botching things up."

In the interview with The Times, Ms. Stoeckley described the scene at the MacDonald home as "horrifying . . . bloody . . . out of control."

"Everytime I would re-enter a room, somebody was struggling with somebody." she said.

She said a scream that MacDonald attributed to his wife was her own, because of the violence developing in the house.

"I went into another room and saw another child in there. She looked like she was sleeping. But it was all dimly lit, you couldn't see anything," she said.

"That's when I backed into something behind me. It was the (toy riding) horse . . . one of the springs was loose.

"I went out of there . . . the blood . . . that's when I realized things were out of control. That's when I screamed . . . ," she said.

She said she remembered going into the back yard to wait for the others but does not remember whether she went back into the house. She said she did remember getting into a car and leaving the house.

Ted Gunderson, a Los Angeles private detective hired by some of MacDonald's friends, said he has found a witness who saw the car pulling away in the manner described by Ms. Stoeckley.

Gunderson also said Ms. Stoeckley has taken a polygraph test indicating her account of the murders was true.

The Times reported it also had learned that the government gave Ms. Stoeckley a polygraph test in April 1971 that indicated she lied when she told an investigator that she had not been in the MacDonald home.

Ms. Stoeckley told the newspaper she had offered to confess to an Army investigator, Robert Brisentine, before he gave her the polygraph test in Nashville, Tenn. She said he offered no encouragement to her request for immunity, and she "got scared" and changed the story.

"One of the drugs I used on the night of the murders was LSD," she said.

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In the Supreme Court of the United States

OCTOBER TERM, 1980

UNITED STATES OF AMERICA, PETITIONER

v.

JEFFREY R. MACDONALD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

REPLY MEMORANDUM FOR THE UNITED STATES

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1. This case presents the important legal question whether the Speedy Trial Clause of the Sixth Amendment applies to a period when a person is not under arrest or formally accused of a crime.[1] Respondent's contention (Br. in Opp. 10-12) that the speedy trial right runs uninterrupted from the time of an arrest ignores this Court's established rule that it is "the actual restraints imposed by arrest and holding to answer a criminal charge" that engage the protections of the Speedy Trial Clause. *United States* v. *Marion*, 404 U.S. 307, 320 (1971). The dismissal of the charges against respondent thus makes this case quite different from *Dillingham* v. *United States*, 423 U.S. 64 (1975), where the

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[1] Because this is purely a legal question, we will not take issue with respondent's statement of facts except to note that we consider some of respondent's assertions to be misleading.

defendant had charges pending against him for 22 months between his arrest and his indictment, and *Klopfer* v. *North Carolina*, 386 U.S. 213 (1967), where the defendant had been discharged from custody but the indictment against him remained outstanding and he could be brought to trial at any time at the whim of the prosecutor.[2] Respondent asserts (Br. in Opp. 11), however, that the anxiety to which he was subjected because of the government's continuing investigation after the charges were dismissed requires the application of the Sixth Amendment. But this is not materially different from the contention that was rejected by this Court in *Marion, supra*, 404 U.S. at 321-322. The Court there explicitly recognized that a defendant may be prejudiced by investigative delay, but it held the Sixth Amendment inapplicable in that context because the situation of such a defendant "does not compare with that of a defendant who has been arrested and held to answer." 404 U.S. at 321. Rather, the Fifth Amendment guarantee of due process and statutes of limitations are the legal protections against investigative delay. 404 U.S. at 322-325.

The unprecedented decision below clearly merits review by this Court. First, it creates a conflict with several other courts of appeals, which was recognized by the dissenters on petition for rehearing en banc (Pet. App. 34a-39a).[3] More importantly, it is clear that an expeditious resolution of the question presented in this case is necessary for the sound administration of the criminal justice system (see Pet. 17-18). Prosecutors frequently decide to dismiss charges after a suspect has been arrested in order to await the development of further evidence or for other legitimate reasons. If the decision of the court below is correct, and the Speedy Trial Clause applies to such defendants while the investigation is continuing, it is important that law enforcement officials be authoritatively apprised of this rule so that they can properly allocate their resources.

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[2] Assuming that the preferral of military charges against respondent triggered the protections of the Sixth Amendment, respondent's situation *prior* to the dismissal of those charges can be analogized to that of the defendant in *Dillingham*, and accordingly the government has already noted that the Speedy Trial Clause does apply to the May 1970-October 1970 period when the military charges against respondent were pending. See Pet. 19-20 nn.11-12.

[3] The two cases relied on by respondent (Br. in Opp. 13-15) do not eliminate this conflict. In *United States* v. *Roberts*, 548 F. 2d 665 (6th Cir.), cert. denied, 431 U.S. 920 (1977), the court summarily rejected a speedy trial claim on the ground that no prejudice had been shown by the delay between arrest and indictment. The case thus cannot reasonably be read to hold that pre-indictment delay after the original charges

2. Respondent also contends at length (Br. in Opp. 15-22) that the pre-indictment delay here violated his right to due process. As we noted in our petition (Pet. 19-22), we agree with the dissents and the district court below (Pet. App. 23a-27a, 45a-46a, 55a) that respondent has not demonstrated either a Fifth Amendment or Sixth Amendment violation because there is no showing that the period of delay impaired his defense in any way. Indeed, even the panel majority, which found a Sixth Amendment violation because it ruled that the possibility could not be excluded that delay was the cause of witness Stoeckley's loss of memory on the stand (Pet. App. 13a-14a), recognized that respondent had not shown actual prejudice (*id.* at 11a). In addition, respondent has not alleged the sort of fundamentally unfair government conduct, such as seeking a tactical

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have been dropped could support a dismissal on speedy trial grounds an issue that was not mentioned in the opinion. In *United States* v. *Lara*, 520 F. 2d 460, 464 (D.C. Cir. 1975), the court cited in *United States* v. *Bishton*, 463 F. 2d 887 (D.C. Cir. 1972), with approval but ordered the indictment dismissed because the delay was deliberately caused by the government to gain an advantage. Cf. *United States* v. *Lovasco*, 431 U.S. 783, 795 (1977); *United States* v. *Marion*, *supra*, 404 U.S. at 324.

advantage, that is a prerequisite to a Fifth Amendment violation. See *United States* v. *Lovasco*, 431 U.S. 783, 795 (1977).

The underlying theme of respondent's contention here is that he is innocent of the crimes charged and that his innocence is demonstrated by certain statements made by Helena Stoeckley both before and after trial (see Br. in Opp. 6-7, 17-19, 21-22). Because Stoeckley's trial testimony did not exonerate him, respondent contends that the delay requires that the indictment be dismissed. We disagree with the premise of this contention. The statements made by Stoeckley and her possible involvement in the crimes were fully investigated by the government prior to trial.[4] In addition, her recent statements cited by respondent (Br. in Opp, 21 n.*, 38A-40A) have been examined by the government, and it is the government's view that they fail to establish a reasonable doubt about the correctness of the jury's verdict. In any case, the "new evidence" in the form of post-trial statements procured by respondent from Stoeckley has no place in the consideration by this Court of the petition for a writ of certiorari. The proper forum for consideration of the significance of these statements is the district court, in consideration of a new trial motion under Fed. R. Crim. P. 33, should respondent elect to file one.[5]

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[4] Stoeckley's statements were characterized by Judge Bryan as "vague, fragmented and contradictory" (Pet. App. 26a). Although she made statements that indicated her belief that she was present at the scene of the crime, she also made contemporaneous statements that she was not present and that she did not know whether she was present or not. See C.A. App. 1188, 1211, 1228, 1251.

[5] Parenthetically, we note that these statements provide additional evidence from Stoeckley herself undercutting the court of appeals' suggestion that her failure to testify at respondent's trial as to her whereabouts at the time of the murders could properly be attributed to the delay in bringing the case to trial (Br. in Opp. 39A; see also Pet. App. 26a-27a).

Respondent also contends (Br. in Opp. 7, 17-19 n.* *, 20 & n.*, 21-22) that the district court erred in refusing to admit under Fed. R. Evid. 804(b)(3) certain testimony by third parties concerning statements made to them by Stoeckley. In our view, the district court acted correctly in declining to admit these statements; the basis for its conclusion that "corroborating circumstances [did not] clearly indicate the trustworthiness of the statement[s]" is explained at Pet. App. 56a-63a. In any event, this issue was not passed on by the court of appeals and is not before this Court. Moreover, even if respondent's contention is correct, the remedy for the asserted error would not be dismissal of the indictment.

For these reasons and the reasons stated in the petition, it is respectfully submitted that the petition for a writ of certiorari should be granted.

WADE H. MCCREE, JR.
Solicitor General

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BRIEF FOR THE UNITED STATES

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QUESTIONS PRESENTED

1. Whether the Speedy Trial Clause of the Sixth Amendment applies to a period when a person is not under arrest or formal accusation of a crime.

2. Whether respondent's constitutional right to a speedy trial was violated by the delay between the commission of the crime and the return of the indictment, assuming *arguendo* that the Speedy Trial Clause applies to that entire period.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-27a) is reported at 632 F.2d 258. The opinion and order on denial of rehearing (Pet. App. 29a-49a) is reported at 635 F.2d 1115. The opinion of the district court (Pet. App. 50a-73a) denying respondent bail pending appeal is reported at 485 F. Supp. 1087. The pretrial opinion of the court of appeals (Br. in Opp. App. 1A-35A) is reported at 531 F.2d 196.

JURISDICTION

The judgment of the court of appeals (Pet. App. 28a) was entered on July 29, 1980. A petition for rehearing was denied on December 18, 1980 (Pet. App. 29a). On February 10, 1981, Justice Brennan extended the time within which to file a petition for a writ of certiorari to and including March 18, 1981. The petition was filed on that date and granted on May 26, 1981 (J.A. 171). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The Sixth Amendment to the Constitution provides in pertinent part:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy trial * * *.

STATEMENT

Following a jury trial in the United States District Court for the Eastern District of North Carolina, respondent was convicted on one count of first degree murder and two counts of second degree murder, in violation of 18 U.S.C. 1111. He was sentenced to three consecutive terms of life imprisonment. The court of appeals reversed the convictions and ordered dismissal of the indictment on the ground that respondent's Sixth Amendment right to a speedy trial had been violated.

1. When the murders of which he was convicted were committed, respondent was a physician holding the rank of captain in the United States Army Medical Corps and was stationed at Fort Bragg, North Carolina. In the early morning of February 17, 1970, respondent's pregnant wife, Colette, and two daughters, Kimberly and Kristen, were bludgeoned and stabbed to death in respondent's quarters at the Fort Bragg military reservation.[1] The Army Criminal Investigation Division (CID) and civilian law enforcement authorities immediately began an investigation of the crime.

During a series of interviews between February 17, 1970, and April 6, 1970, respondent told the investigators his story of what had happened on the night of the murders. He stated that he had been sleeping on the living room couch when he was awakened by the screams of his wife and older child and that he was attacked by three unknown male assailants and knocked unconscious (GX 1135 at 3-6).[2] He described a fourth intruder as a blond female who wore boots, a floppy hat, carried a candle and chanted "acid is groovy, kill the pigs" (*id.* at 4; Tr. 1270).[3] Respondent gave a detailed account of his actions upon regaining consciousness and discovering first his wife's body and then the bodies of his children (GX 1135 at 6-10).

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[1] The early background of this case is set out in the decisions rendered before trial. 531 F.2d 196, 200-201 (1976), rev'd, 435 U.S. 850 (1978).

The investigators also discovered a great deal of physical evidence in the apartment. For example, threads and fibers matching those from the pajama top that respondent was wearing on the night of the murders were found in various areas of the apartment. And the fact that each member of the MacDonald family had a different blood type enabled the investigators to identify the member of the family who was the probable source of each blood stain that was found (see GX 638).

It soon became apparent to CID investigators that many aspects of respondent's story were inconsistent with the physical evidence. For example, respondent had stated that his pajama top had been ripped when he was attacked in the living room and that he awoke to find himself entangled in it; when he discovered his wife's body in the master bedroom, before going into the other rooms, he placed the pajama top over the upper portion of her body (see GX 1135 at 3-13, 28, 68-75). However, threads matching the pajama top had been discovered under Colette's body (see GX 126, 327, 984), in the bedding of both children (see GX 346, 356, 983; GX 362, 982), in a pile of bedding in the master bedroom (GX 978) and on a bludgeon found at the outside rear of the apartment (GX 307, 981); no fibers were found in the living room (Tr. 1727-1728). Moreover, 48 punctures were found in the pajama top, many through the rear of the garment apparently caused by an ice pick; yet respondent had sustained only one wound in the right chest and two other minor cuts, none of which appeared to be caused by an ice pick (Tr. 2648-2651, 4055-4067).[4]

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[2] "GX" refers to government exhibits introduced at trial. "GX 1135" is the transcript of the taped interview with respondent on the morning of April 6, 1970.

[3] "Tr." refers to the transcript at trial.

Accordingly, on April 6, 1970, respondent was advised of his rights and informed that he was a suspect. He was relieved of his medical duties and restricted to quarters. On May 1, 1970, the Army formally charged respondent with murder, pursuant to Article 30 of the Uniform Code of Military Justice (UCMJ), 10 U.S.C. 830. As required by Article 32 of the UCMJ, 10 U.S.C. 832, an investigating officer was appointed to conduct an investigation of the charges and to recommend whether they should be referred to a general court-martial for trial.

A hearing was held pursuant to Article 32 at which the government called 27 witnesses and respondent 29, the majority of whom were character witnesses (531 F.2d at 200). Respondent testified and repeated the story that he had told to investigators. Following the Article 32 hearing, the investigating officer filed a report recommending that the charges against respondent be dismissed. The report also recommended that civilian authorities investigate the alibi of a woman named Helena Stoeckley, because the testimony of a neighbor indicated that she might have been involved (*ibid.*).[5] On October 23, 1970, after review of the report, the Commanding General of respondent's unit accepted the recommendation and dismissed the charges because of insufficient evidence available to justify their reference to trial by court-martial. See *Manual for Courts-Martial, United States* ¶ 33f (rev. ed. 1969). In December 1970, the Army granted respondent an honorable discharge for reasons of hardship. Respondent then moved to California and established himself as a practicing physician (Pet. App. 55a).

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[4] In addition, respondent had alleged that he was attacked with a wooden club, but splinters from the club were found only in the bedrooms, not the living room (GX 437, 982, 983; Tr. 1727-1728); Kimberly's blood was found on the pajama top (Tr. 3649-3650); and Kristen's blood was found on respondent's eyeglasses in the living room (Tr. 3507-3508).

At the request of the Department of Justice, the CID continued its investigation. The investigation was quite extensive, involving several hundred interviews and numerous forensic tests of the evidence found at the crime scene.[6] And, as recommended by the investigating officer, the CID investigated Helena Stoeckley. A CID agent conducted additional interviews with Stoeckley on April 23 and 24, 1971.[7] In June 1972, the CID transmitted to the Justice Department a 13-volume report recommending still further investigation (435 U.S. at 851). After the raw report had been examined by several persons within the Department, the CID was requested to investigate some undeveloped leads. The CID then conducted more interviews and scientific tests and forwarded supplemental reports to the Department on November 9, 1972, and August 20, 1973. Thereafter, after further analysis of the evidence then available, the Department of Justice determined that many unanswered questions in the complex case could be resolved only by the use of the investigative powers of a grand jury. Therefore, in August 1974, a grand jury of the United States District Court for the Eastern District of North Carolina was empanelled to investigate the murders more fully.

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[5] William Posey, a former neighbor of Stoeckley's, had testified that he had seen her arrive home in the early morning of February 17, 1970, in a car occupied by several males. He also testified that she sometimes wore a blond wig and floppy hat, although she was not wearing them on that occasion (J.A. 5-11). About a week after the murders, Stoeckley had told him that she had been questioned by police but could not remember what she did that night because she was "stoned out" (J.A. 11-15). When Posey suggested that she could have been the intruder described by respondent who held a candle, Stoeckley nodded her head in a noncommittal manner (J.A. 21-23). William Ivory, a CID agent, testified that he had twice interviewed Stoeckley and that she could not remember her whereabouts on the night of the murders because she was "out on marihuana" (J.A. 25-26). Respondent was shown a picture of Stoeckley at the Article 32 hearing and was unable to identify it (Art. 32 Tr. M26-M28, M141).

[6] The CID investigation determined that surgical glove remnants found near Colette's body in the master bedroom matched the composition of surgical gloves found beneath respondent's sink (Tr. 1743, 1760-1762, 3911-3915), and that the bludgeon used in the murders was a portion of a bed slat from the MacDonald residence (Tr. 3812). In addition, investigators attempted to identify fingerprints found in the MacDonald residence and to determine possible motives for the homicides. During the same

During the next several months, approximately 75 witnesses, including respondent, were called to testify. At the same time, the Federal Bureau of Investigation un-

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period, the Federal Bureau of Investigation conducted additional examinations of clothing and other evidence found at the crime scene. Laboratory analysts confirmed that the puncture holes in respondent's pajama top were made while the garment was stationary, that they were made by an instrument like the ice pick found outside his quarters, and that large bloodstains matching Colette's blood type were present on the pajama top before it had been torn (Tr. 4058, 4074-4079).

[7] During the first interview, Stoeckley told the agent that, while she could not recall her activities on the night of February 16-17, 1970, due to a "mental block," she believed that she could have been present during the murders and knew who was involved. She later retracted this statement, explaining that during the period of the murders she was disoriented as to time and place because of drug usage. The following day she again recanted her statement concerning participation in the murders and admitted that she had been lying when she said she knew the identity of the killers; in fact, she only suspected some people of involvement (J.A. 137-141).

dertook an extensive reinvestigation of the crime, which resulted in several significant discoveries. The bodies of the victims were exhumed, and it was determined that a blond hair strand found in Colette MacDonald's hand, which the military investigative officer had cited as supportive of respondent's story about the woman intruder (75-1892 J.A. 140), was in fact Colette's own (Tr. 4105-4110). It was also discovered that when respondent's pajama top was folded in a certain manner, the pattern of the puncture holes in the garment corresponded to the pattern of the ice pick wounds in her chest (Tr. 4185-4188, 4191-4193; see GX 787A). In addition, the government learned for the first time that a crumpled and blood-soaked sheet found in the master bedroom near Colette's body bore bloody fabric impressions of her pajamas, suggesting that she had been carried while wrapped in the sheet (Tr. 4130-4152; GX 825, 978). The sheet also bore fabric impressions in her blood left by respondent's torn pajama top (*ibid.*). Neither discovery could be reconciled with respondent's repeated assertion that he had been wearing the pajama top at the time of the attack on his wife and thereafter had removed it and used it to cover her body.

2. On January 24, 1975, shortly before the fifth anniversary of the murders, the grand jury indicted respondent on three counts of premeditated murder. Prior to trial, respondent moved to dismiss the indictment on several grounds, including double jeopardy and denial of the right to a speedy trial (see J.A. 41-47). The district court denied these motions. On the speedy trial question, the court, relying on *United States* v. *Marion*, 404 U.S. 307 (1971), concluded that "[t]he right to a speedy trial under the Sixth Amendment does not arise until a person has been 'accused' of a crime, and in this case this did not occur until the indictment had been returned." See 435 U.S. at 852.

Finding that the issue could properly be appealed before trial, a divided panel of the court of appeals reversed and remanded with instructions to dismiss the indictment on speedy trial grounds. 531 F.2d 196 (1976) (*MacDonald I*). The court viewed the preferral of military charges against respondent on May 1, 1970, and the attendant restriction of his movement, as "the functional equivalent of a civilian arrest" (531 F.2d at 204). Accordingly, it held that the Sixth Amendment guarantee of a speedy trial attached at that time. Because petitioner remained under suspicion and felt obliged to retain a lawyer after the military charges were dismissed, the court noted that his "freedom from detention" during the years prior to indictment "did not, from a practical standpoint, dispel the effects of the government's initial accusation" (*ibid.*). Therefore, the court held that the delay of more than four and one-half years between the military accusation and the indictment triggered the balancing analysis outlined in *Barker* v. *Wingo*, 407 U.S. 514 (1972), for determining the existence of violations of the Sixth Amendment right to a speedy trial.

Applying the *Barker* analysis, the court of appeals conceded that the government had not deliberately delayed charging respondent in order to hamper the defense (531 F.2d at 205-206). However, the court found that the government had provided no satisfactory explanation for the delay between the transmittal of the CID report to the Department of Justice in June 1972 and the empanelling of the grand jury in August 1974; instead this delay was ascribed to "indifference, negligence, or ineptitude" (531 F.2d at 207). The court also stated that respondent "reasonably asserted his right to a speedy trial" (*ibid.*). Finally, the court found that respondent had been prejudiced by the delay because of the need to retain counsel, the anxiety produced by the threat of a prosecution, and the expectation that "in the five years since the murders, memories have faded and witnesses can no longer be expected to reliably recall details" (*id.* at 207-208). The court concluded that a weighing of these factors indicated a violation of respondent's Sixth Amendment right to a speedy trial (*id.* at 208).

Judge Craven dissented (531 F.2d at 209-214). He reasoned that because the military charges against respondent had been dismissed in October 1970, and because respondent had "stood under no 'public accusation' " during the ensuing four-year period prior to the indictment, the majority's conclusion that respondent's right to a speedy trial continued unabated from May 1970 until the return of the indictment in January 1975 was incorrect (*id.* at 212-213). Judge Craven viewed respondent's claim as one alleging a violation of due process as a result of pre-indictment delay, which he found unsupported by evidence of actual prejudice (*id.* at 214).[8]

After the Fourth Circuit denied a petition for rehearing en banc by a 3-3 vote, this Court granted certiorari. The Court vacated the decision of the court of appeals, holding that an interlocutory appeal may not be taken from the denial of a motion to dismiss on speedy trial grounds. 435 U.S. 850 (1978). In light of its holding on the appealability issue, the Court did not reach the government's contention that the court of appeals had erred in applying the protections of the Sixth Amendment to the entire period from the military accusation to the indictment. 435 U.S. at 863 n.9. On remand, the court of appeals held that a trial on the federal indictment would not violate the Double Jeopardy Clause. 585 F.2d 1211 (1978).

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[8] Judge Craven also disputed the majority's conclusion that respondent had been subject to the civilian equivalent of arrest as the result of the preferral of military charges and his restriction to quarters. He reasoned that, although a probable cause determination is a prerequisite to an arrest as the term is used in the Sixth Amendment context, no such determination is necessary for preferral of charges under military law. Judge Craven concluded that the Army's inquiry fell "somewhere between an unsuccessful presentation to a grand jury and an arrest and subsequent release because of a failure to demonstrate probable cause for the arrest," neither of which activates the Sixth Amendment's speedy trial guarantee. 531 F.2d at 210-213.

3. Respondent's trial commenced in July 1979 after a renewed motion to dismiss on speedy trial grounds (J.A. 48-49) was denied by the district court. The government's case at trial consisted almost exclusively of physical evidence gathered during the exhaustive investigation, together with interpretive scientific testimony. See Pet. App. 16a. This evidence showed that respondent's story of his actions on the night of the murders was a fabrication designed to conceal the fact that he had committed the murders himself. Helena Stoeckley appeared as a defense witness at the trial. She testified that she had ingested large quantities of drugs on February 16, 1970, and repeated her previous statements that she had no recollection concerning her whereabouts between midnight and 4:30 a.m. on February 17, 1970. She denied any involvement in the murders of respondent's family and admitted that her knowledge of the killings was the product of what others had related to her (J.A. 52-54, 102-104, 105).[9] The jury returned a verdict of guilty on one count of first-degree murder and two counts of second-degree murder.

4. After trial respondent moved to vacate the conviction and dismiss the indictment on speedy trial grounds (J.A. 170). The district court denied this motion (Pet. App. 74a-75a), setting forth its reasons in a decision denying respondent bail pending appeal (*id.* at 51a-56a). First, the court pointed out that respondent had suffered neither "oppressive pretrial incarceration" nor "great

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[9] Respondent moved to admit, as declarations against interest under Fed. R. Evid. 804(b)(3), testimony of other witnesses concerning Stoeckley's prior statements to them that suggested her possible involvement in the murders. After hearing on voir dire the testimony of six persons to whom Stoeckley had made vague and contradictory statements concerning her knowledge of the murders (see J.A. 121-169), the trial court ruled the testimony inadmissible on the ground that corroborating circumstances did not indicate the trustworthiness of the statements (Pet. App. 56a-63a); indeed, the court concluded that the statements were "clearly untrustworthy" (*id.* at 61a).

anxiety and concern" because of the pre-indictment delay in that he had spent the majority of the period establishing himself in the practice of medicine in California (*id.* at 54a-55a). Then, noting that it had paid specific attention during the trial to the possibility of prejudice to the defense because of the delay (*id.* at 53a), the court stated that "[t]he fears expressed by the Fourth Circuit in its 1976 decision that [respondent's] ability to defend the case adequately might be seriously prejudiced by the pre-indictment delay have not been borne out in the record developed at trial" (*id.* at 55a).[10] In the absence of any prejudice, the court concluded that respondent's speedy trial claim should be denied.

A divided court of appeals reversed (Pet. App. 1a-27a). The court explicitly adopted the reasoning of the first panel with respect to three of the *Barker* factors—the length of the delay, the reason for the delay, and respondent's assertion of his speedy trial right (*id.* at 4a). It went on to discuss each of these factors briefly. The court emphasized that the "military arrest" of respondent triggered his speedy trial right and thus that the relevant delay was the entire period between "the military arrest and trial" (*ibid.*). The court noted, however, that the "most offending delay" was the two-year period between the transmission of the CID report to the Justice Department and the institution of the grand jury proceeding (*id.* at 8a). The court characterized this delay as the product of "sheer bureaucratic indifference" (*id.* at 7a).

Turning to the question of prejudice to the defense at trial, the court first noted that "[t]he evidence at trial, if anything, confused rather than clarified the question of actual prejudice at trial" (Pet. App. 9a). The court then explained that "[t]he substantial possibility of prejudice is what controls; it is not incumbent on the defendant to prove that prejudice inescapably took place" (*id.* at 11a). Citing the "almost certain memory erosion" of the witnesses (*id.* at 14a) and the difficulty that respondent would have had, in light of the nine-year delay,[11] in testing the consistency of prosecution witnesses' trial testimony with their original statements, given the risk that the prosecutors had bolstered their recollection in preparing for trial (*id.* at 10a), the court concluded that there was a "substantial possibility that [respondent's] defense was prejudiced by the delay" (*id.* at 14a). In particular, the court noted that the testimony of defense witness Helena Stoeckley "had a great potential for prejudice" (*id.* at 11a). Although the court acknowledged that, within a week of the murders, Stoeckley had told her neighbor Posey that she had no recollection of her activities on the night of the crime and that "[h]er memory has resembled a lightbulb not screwed tight, blinking on and off" (*id.* at 13a), it concluded that "the possibility, indeed the probability, that unreasonable delay was the cause [of Stoeckley's memory gap] cannot be excluded" (*id.* at 13a-14a). The court then noted that the amount of trial prejudice necessary to demonstrate a speedy trial violation depends on the other *Barker* v. *Wingo* factors. Balancing all of those factors, the court of appeals concluded that respondent's Sixth Amendment rights had been violated (*id.* at 16a-17a).

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[10] Specifically, the court observed that no defense witness died during the delay, that several witnesses "vital to the defense" would have been either unknown or unavailable if the trial had been conducted shortly after commission of the offense, and that respondent had not alleged any particular in which his defense was prejudiced by the delay (Pet. App. 55a-56a).

Judge Bryan dissented. First, he disputed the court's view that the lapse of time between the commission of the crime and the indictment was inexcusable. In light of the complexity of the case, Judge Bryan found that the deferral of the submission of the case to the grand jury was "well advised" (Pet. App. 21a). Both the government's interest in the investigation and considerations of fairness to the respondent dictated that a grand jury not be convened until the government had gleaned all available evidence (*id.* at 21a-22a). Judge Bryan also rejected the court's conclusion regarding prejudice at trial, finding that respondent's ability to defend himself was in no way prejudiced by the delay (*id.* at 23a-27a).[12]

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[11] The court acknowledged that not all of the nine-year delay was attributable to the government, but nonetheless remarked that "all of it contributed to the fading of memories" (Pet. App. 10a n.2).

5. The Fourth Circuit denied the government's petition for rehearing en banc by a 5-5 vote. Chief Judge Haynsworth dissented with a brief statement and Judges Russell, Widener, Hall and Phillips filed a fuller dissenting opinion (Pet. App. 29a-47a). In that opinion, the dissenting judges focused on what they deemed the panel's error in including as relevant to the Sixth Amendment inquiry the period between the dismissal of military charges against respondent in October 1970 and his indictment in January 1975. During this period, the dissent explained, respondent was not under arrest, indictment or any other form of legal accusation, and thus there was no hearing or other proceeding pending that he could demand be held speedily; in short, "there was nothing to which a claim for a speedy trial could attach" (*id.* at 33a). Citing decisions of other courts of appeals on this point, the dissent concluded that a Sixth Amendment speedy trial claim cannot be predicated upon delay

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[12] Focusing specifically on witness Stoeckley's inability to recall her activities on the night of the murders, Judge Bryan observed that she had testified that her memory gap resulted from her consumption of large quantities of drugs that night, and that the statements concerning the murders that she had made during the intervening years were "vague, fragmented and contradictory" (Pet. App. 26a). Thus, the record in no way indicated that the passage of time had weakened Stoeckley's recollection of the events of February 17, 1970; rather, her own testimony indicated "a preexisting gap in her ability to recount those events" (*id.* at 26a-27a & n.5).

that occurs when the defendant is not subject to any restraint or legal accusation. Rather, if a defendant is prejudiced by such a delay, his claim is one of deprivation of due process under the Fifth Amendment (*id.* at 38a-39a).

The dissenters went on to address the Sixth Amendment question on the assumption, *arguendo*, that the panel had correctly applied that provision to the period of pre-indictment delay. First, they concluded that, in light of the complexity of the case and the need to proceed with great care so as not to absolve a guilty party or unfairly charge an innocent party, the government was not guilty of excessive delay in beginning the prosecution (Pet. App. 41a-44a). Second, with respect to the prejudice resulting from the delay, the dissenters explained that respondent had not suffered oppressive pretrial incarceration, nor any anxiety different from that suffered by any person under criminal investigation, nor, as explained in Judge Bryan's dissent, any prejudice to his defense as a result of the pre-indictment delay (*id.* at 45a-46a).

Chief Judge Haynsworth expressed his "tentative agreement" with the government's contention that the period between the dismissal of the military charges against respondent and the return of the indictment is irrelevant for Sixth Amendment purposes (Pet. App. 29a-30a). Judge Murnaghan, author of the panel opinion, filed a statement (*id.* at 48a-49a) clarifying that the panel considered in its Sixth Amendment analysis only the delay prior to the January 1975 indictment.[13]

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[13] It has been conceded by respondent that the delay between the indictment and trial was not the responsibility of the government (see *id.* at 19a n.2; 531 F.2d at 202).

SUMMARY OF ARGUMENT

I.

A. By its terms, the Speedy Trial Clause applies only to a period when a criminal prosecution is underway. In the absence of charges pending against an accused, he is not, in the constitutional language, "in [a] criminal prosecution[ ]," and accordingly there is nothing to which a speedy trial claim can attach. Thus, in *United States* v. *Marion*, 404 U.S. 307 (1971), this Court held that a lengthy period of pre-accusation delay could not constitute a violation of the Sixth Amendment. The Court explained that the institution of formal charges by arrest or indictment subjects the accused to certain consequences not otherwise present, such as a serious interference with his liberty and the public obloquy that attends a formal accusation. The Court concluded that "it is either a formal indictment or information or else the actual restraints imposed by arrest and *holding to answer a criminal charge* that engage the particular protections of the speedy trial provision of the Sixth Amendment" (*id.* at 320; emphasis added).

The same reasons that underlie the proposition that the speedy trial guarantee is not engaged until formal accusation of a crime indicate that the Speedy Trial Clause no longer applies after a criminal proceeding has been terminated. Here, for example, once the military charges against respondent were dismissed, he was no longer the subject of public accusation and his liberty was not restricted. The "public obloquy" that arose from the preferral of charges was presumably eliminated by the public dismissal of those charges and the honorable discharge issued to respondent by the Army, and respondent was able to resume his personal and professional life. There simply were no longer any charges on which respondent speedily could be tried.

The court of appeals' contrary conclusion that the Speedy Trial Clause applies to the period when no charges were pending against respondent is based on the anxiety and expense incurred by him because he knew that he remained under suspicion for the crimes. This reasoning is directly contrary to the very distinction drawn by this Court in *Marion*, because the same considerations apply to any individual known to be the subject of an ongoing investigation. It is true that delay may cause prejudice when no charges are pending against an individual, but the primary protection against such prejudice is the statute of limitations. Moreover, such delay is subject to the constraints of the Due Process Clause; the Sixth Amendment simply has no application to a period when no charges are pending. See *United States* v. *Lovasco*, 431 U.S. 783, 788-789 (1977).

B. Application of the Speedy Trial Clause to a period after charges have been dismissed would also have a substantial adverse impact upon the administration of justice. Just as there may be sound policy reasons for postponing the commencement of a prosecution, it is also desirable in many cases to dismiss charges after a person has been arrested or formally charged. A witness may become unavailable or new evidence may come to light that alters the basis for the original decision to bring charges. But these exercises of prosecutorial discretion will be greatly discouraged if the Speedy Trial Clause continues to apply after dismissal. Rather than forfeit the government's right to try the accused at any time, prosecutors will have an incentive to proceed with prosecutions that otherwise might have been dismissed pending further investigation. The result will be deleterious to both defendants and the government. In some cases, persons will be prosecuted who might never have been brought to trial if the investigation had been permitted to run its course. In other cases, guilty defendants will be acquitted because of the government's inability in the short time after arrest to develop compelling proof of guilt.

Congress gave deference to these policy concerns when it enacted the Speedy Trial Act of 1974, 18 U.S.C. 3161 *et seq.*, "to give effect to the sixth amendment right to a speedy trial." S. Rep. No. 93-1021, 93d Cong., 2d Sess. 1 (1974). The Act provides that if charges are dismissed and then later reinstituted, the intervening period when no charges are pending is not counted in the speedy trial calculations. 18 U.S.C. 3161(d) and 3161(h)(6). This rule intelligently advances the interests protected by the Sixth Amendment and, in our view, reflects the proper interpretation of the constitutional provision.

II.

If the Court agrees with our submission that the Speedy Trial Clause does not apply to a period when no charges are pending against an individual, it is clear that respondent's speedy trial rights have not been violated. If the Court rejects our submission, however, it is necessary to examine the speedy trial factors enunciated in *Barker* v. *Wingo*, 407 U.S. 514 (1972). In our view, the court of appeals misapplied those factors and erred in finding a Sixth Amendment violation.

The reason for the delay should not be weighed heavily against the government in this case. Most of the period after the dismissal of the military charges was spent in a massive investigation of a complex crime. The CID submitted investigative reports to the Department of Justice in June 1972, November 1972 and August 1973, and some important discoveries in the case were not made until a grand jury was convened in August 1974. In light of the complexity of the case and the gravity of a decision to seek an indictment, the government was "well advised" (see Pet. App. 21a) to postpone convening the grand jury until it had investigated all leads and carefully considered all views as to the wisdom of seeking an indictment, and the delay here was "not * * * excessive" (*id.* at 44a).

The court of appeals' conclusion that respondent asserted his right to a speedy trial, the third *Barker* factor, demonstrates the incongruity of applying the speedy trial analysis to a period when no charges are pending. The court's conclusion was based on letters by respondent's counsel to the Department of Justice asking about the progress of the investigation or urging the government to terminate the investigation on the ground that the military proceeding had established respondent's innocence. These hardly constituted demands by respondent, who had fiercely and successfully resisted institution of court-martial proceedings, that he be charged and tried by civilian authorities.

Finally, there is no basis for finding that respondent was prejudiced by the delay in any respect. Despite this Court's admonition that a claim of impaired defense must be analyzed in light of the facts as developed at trial (*United States* v. *MacDonald*, 435 U.S. 850, 858 (1978)), the court of appeals rested its decision primarily on general speculation about potential problems always present when there is delay. The record does not support the assertions that respondent was prejudiced by the inability of witnesses to testify to recollection independent of that reflected in previous statements (see Pet. App. 10a) or by the "almost certain memory erosion" of all the witnesses (*id.* at 14a). The one specific item of prejudice identified by the court of appeals, defense witness Helena Stoeckley's failure to exculpate respondent, is flatly refuted by the record. Numerous statements made by Stoeckley shortly after the murders demonstrate, as the dissenters on rehearing noted (*id.* at 46a), that her failure at trial to recall her whereabouts on the night of the murders was not "a condition which developed as a result of any delay." Rather, it reflected a "pre-existing gap" in her memory (*id.* at 27a n.5).

ARGUMENT

I

THE SPEEDY TRIAL CLAUSE OF THE SIXTH AMENDMENT DOES NOT APPLY TO A PERIOD WHEN A PERSON IS NOT UNDER ARREST OR OTHER FORMAL ACCUSATION OF A CRIME

The court of appeals' inclusion in its speedy trial calculations of the period from October 1970 to January 1975, when respondent was not under arrest, indictment or any other legal restraint or formal charges, constitutes a serious misapplication of the Speedy Trial Clause of the Sixth Amendment. The court of appeals' decision is at odds with the language of the Constitution and the applicable decisions of this Court. Moreover, if allowed to stand, it will have a substantial detrimental impact upon the effective administration of the criminal laws by inhibiting prosecutors from exploring all avenues of inquiry, both favorable and unfavorable to a suspect, before proceeding with criminal charges.

A. The Sixth Amendment Speedy Trial Guarantee is Designed to Ensure the Expeditious Resolution of Pending Criminal Charges

The Sixth Amendment provides that "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial * * *." As this Court explained in *United States* v. *Marion*, 404 U.S. 307, 313 (1971), "[o]n its face, the protection of the Amendment is activated only when a criminal prosecution has begun and extends only to those persons who have been 'accused' in the course of that prosecution." And the history of the Speedy Trial Clause confirms that the constitutional guarantee applies only when a criminal prosecution against an accused is underway. See *id.* at 313-320; *Klopfer* v. *North Carolina*, 386 U.S. 213, 223-226 (1967). Accordingly, the Court in *Marion* rejected the defendant's contention that the period of pre-indictment delay had violated his constitutional right to a speedy trial. In *Dillingham* v. *United States*, 423 U.S. 64 (1975), the Court reaffirmed its statements in *Marion* that the protections of the Speedy Trial Clause apply during a period when charges are pending against a defendant after his arrest, even though he has not yet been indicted. But this Court has steadfastly refused to apply the Speedy Trial Clause to a period when a defendant is not subject to a public accusation. See *United States* v. *Lovasco*, 431 U.S. 783, 788-789 (1977).

The Court in *Marion* recognized that pre-accusation as well as post-accusation delay can have an adverse impact on a defendant. The loss of exculpatory evidence, the death of witnesses with favorable testimony and the impairment of memories resulting from delay can harm a defendant's ability to defend himself whether the delay is before or after he is formally accused. But the Court concluded that "this possibility of prejudice at trial is not itself sufficient reason to wrench the Sixth Amendment from its proper context" by extending it to pre-accusation delay. 404 U.S. at 321-322. The Sixth Amendment requirement that the government speedily dispose of criminal charges simply makes little sense when no such charges are pending.

The Court explained the rationale for the Constitution's focus on post-accusation delay as follows (404 U.S. at 320; emphasis added): "Arrest is a public act that may seriously interfere with the defendant's liberty, whether he is free on bail or not, and that may disrupt his employment, drain his financial resources, curtail his associations, subject him to public obloquy, and create anxiety in him, his family and his friends. * * * So viewed, it is readily understandable that it is either a formal indictment or information or else the actual restraints imposed by arrest and *holding to answer a criminal charge* that engage the particular protections of the speedy trial provision of the Sixth Amendment." It is only the maintenance of formal charges that implicates these concerns to such an extent that the speedy trial guarantee is invoked. Thus, the Court drew a sharp distinction between persons against whom charges are pending and persons who are only the subject of a criminal investigation. A citizen not subject to formal charges "suffers no restraints on his liberty and is not the subject of public accusation"; therefore, for Sixth Amendment purposes, "his situation does not compare with that of a defendant who has been arrested and *held to answer*." *Id.* at 321 (emphasis added).[14]

The same reasons that underlie the proposition that the speedy trial guarantee is not engaged until formal accusation of a crime suggest that the Speedy Trial Clause no longer applies after a criminal proceeding has been terminated. The particular consequences triggered by the institution of criminal charges are largely dispelled; the individual is no longer the subject of public accusation and suffers no interference with his liberty.

Here, for example, once the military authorities determined in October 1970 that there was insufficient evidence to warrant referral of the charges against respondent to a general court-martial, his interest in securing a speedy trial on those charges was extinguished. With the dismissal of the military charges, respondent was no longer publicly accused of any crime, nor was his liberty in any way restricted.[15] To the contrary, he was restored to his duties as a military physician with the rank of captain until he was honorably discharged for reasons of hardship in December 1970. Thereafter, as the trial judge observed (Pet. App. 55a), he moved to California, where he promptly established himself in the practice of medicine and made many friends. Whatever stigma may have resulted from the preferral of charges and the attendant publicity was presumably eliminated by the public dismissal of those charges and the official acknowledgement that respondent's conduct during his term of military service had been honorable. From the time of the dismissal of the military charges in October 1970 until respondent's indictment by a grand jury in January 1975, there simply was no formal accusation of wrongdoing upon which he could have been tried and thus nothing to which his speedy trial claim could attach (see Pet. App. 33a).[16] Under these circumstances, the decision below that respondent's right to a speedy trial nevertheless continued to run between October 1970 and January 1975 "wrench[es] the Sixth Amendment from its proper context." *United States* v. *Marion*, *supra*, 404 U.S. at 322. See generally *Fourth Circuit Review—Misapplication of the Constitutional Rights to a Speedy Trial*, 38 Wash. & Lee L. Rev. 563, 586-587 (1981).[17]

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[14] The Court's opinion in *Marion* makes clear that it is not arrest in itself, but rather arrest together with the filing of charges, that activates the speedy trial guarantee. Certainly if a person were arrested and immediately released without a complaint being filed, no speedy trial right would attach. In such a situation, even the Sixth Amendment right to counsel does not attach. See *Gerstein* v. *Pugh*, 420 U.S. 103, 119-122 (1975); *Kirby* v. *Illinois*, 406 U.S. 682, 688-689 (1972) (plurality opinion).

[15] As noted in our petition (Pet. 20 n.12), we assume for the purposes of this case that the protections of the Sixth Amendment were initially triggered when respondent was charged by the military in May 1970, although Judge Craven's dissent in *MacDonald I* casts doubt on this conclusion. See 531 F.2d at 209-214.

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[16] Indeed, respondent's honorable discharge in 1970 permanently terminated the ability of military authorities to bring charges against him. *United States ex rel. Toth* v. *Quarles*, 350 U.S. 11, 22-23 (1955).

[17] The dismissal of the charges against respondent makes this case quite different from *Klopfer* v. *North Carolina*, *supra*, where, although the defendant had been discharged from custody, the indictment against him remained outstanding and he could have been brought to trial at any time at the whim of the prosecutor. As Justice Harlan noted, the unusual North Carolina procedure involved in *Klopfer* allowed "state prosecuting officials to put a person under the cloud of an unliquidated criminal charge for an indeterminate period." 386 U.S. at 227 (Harlan, J., concurring). *Dillingham* v. *United States*, *supra*, is similarly inapposite. There, the defendant had charges pending against him without interruption for 22 months between his arrest and indictment.

The fact that the Speedy Trial Clause does not apply to a period when no charges are pending does not strip defendants of protection against excessive or oppressive delay. The "primary guarantee against bringing overly stale criminal charges" is the statute of limitations. *United States* v. *Ewell*, 383 U.S. 116, 122 (1966); see also *United States* v. *Lovasco, supra*, 431 U.S. at 789; *United States* v. *Marion, supra*, 404 U.S. at 322.[18] Moreover, unfair pre-accusation delay is subject to the constraints of the Due Process Clause of the Fifth Amendment. See *United States* v. *Lovasco, supra.* But the specific protections of the Sixth Amendment can have no application when there are no charges that can speedily be tried.

The court of appeals' decision that the Speedy Trial Clause applies to the period during which no charges were pending against respondent is a sharp departure from these well-established principles. The only justification given for this result was the conclusion in *MacDonald I* that the dismissal of the military charges did not "dispel the effects of the government's initial accusation." 531 F.2d at 204. In support of this conclusion, the court observed that respondent "realized that the favorable conclusion of the Article 32 proceeding was not the end of the government's efforts to convict him. Prudence obliged him to retain attorneys at his own expense for his continuing defense. He remained under suspicion and was subjected to the anxiety of the threat of another prosecution." *Ibid.* (footnote omitted). The court below gave no more specific explanation of its inclusion of this period in its speedy trial calculations. However, in his statement on denial of the petition for rehearing, Judge Murnaghan echoed this theme, noting that "[t]he immense publicity and the continued inquietude because the matter was not put to rest engaged the tenets of the Sixth Amendment" (Pet. App. 49a).

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[18] We note in this connection that there is no period of limitations applicable to the grave offenses with which respondent was charged. 18 U.S.C. 3281. See *United States* v. *Provenzano*, 423 F. Supp. 662, 664-666 (S.D.N.Y. 1976), aff'd, 556 F.2d 562 (2d Cir. 1977) (where statute provides for death penalty, 18 U.S.C. 3281 applies even though death penalty cannot constitutionally be imposed) (dictum). Nevertheless, the indictment here was returned within five years from the date of the slayings.

Even assuming these descriptions accurately reflect respondent's position between October 1970 and January 1975, they provide an inadequate basis for applying the Speedy Trial Clause to that period. His situation was no different from that of any individual who, although not yet arrested or formally charged with a crime, is aware that he is the subject of an ongoing investigation for a serious offense. The targets of such inquiries surely suffer anxiety at the prospect of future arrest, indictment and prosecution, and prudence frequently obliges them to retain attorneys. In many cases, the offense may be highly publicized, and known targets of the investigation will be subjected to intrusive and unfavorable publicity.

This Court has considered and rejected the contention that these considerations engage the "particular protections" of the Speedy Trial Clause. *United States* v. *Marion*, *supra*, 404 U.S. at 320. In *Marion*, a government investigation of fraudulent business practices had been the subject of widespread publicity well before the criminal charges were actually brought. More than two years prior to the indictment, a series of newspaper articles concerning the investigation had appeared. These articles, which named the defendants' company, had quoted the United States Attorney as predicting that indictments would soon be forthcoming. Moreover, almost two years prior to the indictment, the defendants had been asked by the United States Attorney's Office to submit business records pertinent to the investigation, and one defendant had been interviewed by the investigators. See 404 U.S. at 309. Thus, the defendants in *Marion* certainly suffered anxiety, adverse publicity, and incurrence of legal expenses of the same kind as that suffered by respondent after the charges against him were dismissed. Yet this Court explicitly held that these harmful consequences did not implicate the protections of the Speedy Trial Clause. *Marion* stands for the proposition that the situation of a citizen who suffers "no restraints on his liberty and is not the subject of public accusation * * * does not compare with that of a defendant who has been arrested and held to answer." 404 U.S. at 321. The conclusion of the court of appeals that the protections of the Sixth Amendment are activated by the harmful consequences of the continuing investigation of respondent's involvement in the murders thus obliterates the very distinction drawn in *Marion.* See *United States* v. *Elsbery*, 602 F.2d 1054, 1059 (2d Cir.), cert. denied, 444 U.S. 994 (1979).

The other courts of appeals that have addressed this issue generally have followed the logical implications of *Marion* and have held that the Sixth Amendment speedy trial protection does not extend to a period when no charges are pending. In *United States* v. *Martin*, 543 F.2d 577 (6th Cir. 1976), cert. denied, 429 U.S. 1050 (1977), the defendant was charged with an offense in August 1972, but those charges were dismissed in January 1973. He subsequently was indicted in December 1974. In rejecting the defendant's claim that his Sixth Amendment right to a speedy trial had been denied, the court stated (543 F.2d at 579): "The Sixth Amendment right to a speedy trial does not attach until the formal charge, the trial of which is alleged to have been inordinately and prejudicially delayed, is made. * * * Because there was no indictment which could have been tried in the period between January 1973 and December 1974, we cannot say that a speedy trial was delayed during that time." [19]

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[19] Contrary to respondent's contention (Br. in Opp. 13), *Martin* has not been overruled *sub silentio* by *United States* v. *Roberts*, 548 F.2d 665 (6th Cir.), cert. denied, 431 U.S. 920 (1977). In *Roberts*, the Court summarily rejected a speedy trial claim on the ground

In *United States* v. *Bishton*, 463 F.2d 887 (D.C. Cir. 1972), the defendant was reindicted on federal charges after the initial charges against him brought under District of Columbia law had been dismissed on jurisdictional grounds. In rejecting the claim that the defendant's right to a speedy trial had been violated, the court declined to consider for speedy trial purposes the period after the first prosecution had been terminated but before the second had begun. Noting that "during this time appellant was a free man against whom no prosecution was pending," the court concluded that "[w]hen a citizen stands neither arrested nor indicted for an offense, he 'suffers no restraints on his liberty and is not the subject of public accusation; his situation does not compare with that of a defendant who has been arrested and held to answer.' United States v. Marion, *supra*, [404 U.S.] at 321." 463 F.2d at 891.

In *United States* v. *Hillegas*, 578 F.2d 453 (2d Cir. 1978), the defendant was first charged with an offense in April 1974, but the complaint was dismissed a month later when two government informants ceased cooperating with the prosecution. The defendant was later indicted in October 1977, when the testimony of those witnesses again became available. The defendant claimed that the district court's speedy trial plan had been violated. In considering the significance of the delay of more than three years between the dismissal of the complaint and return of the indictment, the court of appeals observed:

> After the Government's dismissal of the complaint against him appellant * * * was no longer under any of the restraints associated with arrest and the pendency of criminal charges against him. He was

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that no prejudice had been shown by the delay between arrest and indictment. The case thus cannot reasonably be read to hold that pre-indictment delay after the original charges have been dropped could support dismissal on speedy trial grounds—an issue not even mentioned in the opinion.

> free to come and go as he pleased. He was not subject to public obloquy, disruption of his employment or more stress than any citizen who might be under investigation but not charged with a crime. Unless and until a formal criminal charge was filed against him, neither he nor the public generally could have any legitimate interest in the prompt processing of a nonexistent case against him.

Id. at 458 (footnote omitted). Accordingly, the court concluded that dismissal of the charge in May 1974 tolled the government's obligation to bring the defendant to trial within the time limits fixed by the plan. See also *United States* v. *McClean*, 528 F.2d 1250, 1258 (2d Cir. 1976); *United States* v. *Flores*, 501 F.2d 1356, 1359-1360 (2d Cir. 1974).[20]

The Ninth Circuit has also adopted the view that the Speedy Trial Clause does not apply to a period when no charges are pending. In *Arnold* v. *McCarthy*, 566 F.2d 1377, 1383 (9th Cir. 1978), the court held that the Speedy Trial Clause did not apply to the period between the dismissal of an indictment and a subsequent indictment one year later. The court explained that "[a]fter the dismissal [the defendant] was no longer 'accused'; he no longer had any right to demand a speedy trial under the Sixth Amendment." *Id.* at 1383.[21] Only the Fifth Circuit has demonstrated any uncertainty over this issue. Compare *United States* v. *Nixon*, 634 F.2d 306, 309 (5th Cir. 1981), petition for cert. pending, No. 80-2002 (filed May 27, 1981), and *United States* v. *Avalos*, 541 F.2d 1100, 1108-1109 n.13 (5th Cir. 1976), cert.

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[20] *Hillegas* technically involved application of the district court's local prompt disposition rules rather than the Sixth Amendment, but it is clear from the court's decision that the same analysis would be applied to a constitutional speedy trial claim. See 578 F.2d at 457.

[21] The Ninth Circuit has since suggested that *Arnold* would not necessarily be controlling where the dismissal of the original charges does not follow the declaration of a mistrial. *United States* v. *Henry*, 615 F.2d 1223, 1233 n.13 (1980).

denied, 430 U.S. 970 (1977) (dismissal of indictment does not toll speedy trial calculation if defendant is reindicted on same charge), with *United States* v. *Davis*, 487 F.2d 112, 116 (5th Cir. 1973), cert. denied, 415 U.S. 981 (1974) (Sixth Amendment analysis applied to period from date of second indictment). In sum, decisions of this Court and of the courts of appeals clearly establish that the Speedy Trial Clause has no application to a period when no charges are pending.[22]

B. Extension of the Speedy Trial Clause to the Period After Charges Against An Accused Have Been Dismissed Would Have a Substantial Adverse Impact Upon the Administration of Justice

In *United States* v. *Lovasco, supra*, 431 U.S. at 791-796, this Court pointed out that there are sound reasons for not requiring a prosecutor to file criminal charges as soon as probable cause is established to his satisfaction, or, indeed, even when he believes he has assembled sufficient evidence to prove guilt beyond a reasonable doubt. For example, insisting on immediate prosecution once sufficient evidence is developed to support conviction would pressure prosecutors into resolving doubtful cases in favor of early, perhaps unwise, prosecutions. Prosecutors would be unable adequately to evaluate factors that bear upon the charging decision and might have to ignore factors, such as the availability of a witness, that make immediate prosecution inadvisable. See generally ABA Project on Standards for Criminal Justice, *The Prosecution Function* § 3.9 (Approved Draft 1971).

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[22] Of course, the Fifth Amendment Due Process Clause does protect defendants against unfair delay during a period when no charges are pending. When charges are dismissed by the government in order to gain an unfair tactical advantage over the defendant (see *United States* v. *Lovasco, supra*, 431 U.S. at 795), delay after dismissal of the charges is correctly considered in assessing a due process claim. Two cases have found that when indictments in the District of Columbia were dismissed in order to gain a more favorable prosecutorial forum in Florida, the resulting delay between indictments should be weighed against the government. *United States* v. *Avalos, supra*, 541 F.2d at 1108-1109 n.13; *United States* v. *Lara*, 520 F.2d 460, 464-465 (D.C. Cir. 1975). While such delay certainly is material to the Fifth Amendment analysis, we disagree with those cases to the extent that they suggest that the period after dismissal should be considered under the Sixth Amendment. In any event, those cases have no application here, where there is no contention that any delay was the result of a deliberate attempt to secure a tactical advantage by the government.

Such considerations also constitute legitimate reasons for dismissing a criminal case after a person has been arrested or formally charged. Arrests may be made improperly or indictments obtained prematurely.[23] Even when an arrest or indictment is proper, the government may decide not to pursue the case because subsequent and considered judgment determines that the evidence, although sufficient to provide a basis for a charge, may not be sufficient to persuade a jury of guilt beyond a reasonable doubt. In other instances something may occur that alters the basis for the original decision to file charges, such as a witness becoming unavailable or new evidence coming to light. Or non-evidentiary factors, such as the character and apparent motives of the particular defendant or the likelihood of his prosecution for the same offense by another jurisdiction, could indicate that a criminal prosecution would not be in the public interest.

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[23] This case presents a particularly good illustration of why policy considerations militate against barring a prosecution because charges had earlier been filed prematurely and dismissed. The Justice Department did not control the antecedent military proceedings and did not consider respondent's case until the military charges were dropped. Thus, this case is somewhat analogous to one where a federal indictment follows the dismissal of charges by a state. In such a case, the speedy trial protection attached to the federal prosecution does not date from the state arrest. See *United States* v. *Rowell*, 612 F.2d 1176, 1180 (7th Cir. 1980). See generally *Fourth Circuit Review—Misapplication of the Constitutional Rights to a Speedy Trial, supra*, 38 Wash. & Lee L. Rev. at 582-583 & n.186.

See *United States* v. *Lovasco, supra,* 431 U.S. at 793-794 & n.15. Such dismissals are beneficial to both the defendant and the government. A defendant is released from a pending charge and its attendant anxiety, expense, and infringement of liberty. The government is given an opportunity to continue its investigation and to reassess its decision not to prosecute if new evidence is discovered.

Under the court of appeals' decision that a defendant's speedy trial rights, once triggered by an arrest or the institution of formal charges, continue to run despite dismissal of the charges, this salutary practice will be discouraged. Prosecutors will be induced to bring cases to trial to avoid the risk of dismissal on speedy trial grounds even when it might otherwise be appropriate to dismiss the charges to permit further investigation. The result will be that individuals who would otherwise not be tried at all may be subjected to the financial and emotional burdens of a trial. In other cases, guilty defendants will be acquitted because of the government's inability in the period directly following arrest to develop compelling proof of guilt. Even if the prosecutor does elect to dismiss the charges in order to develop additional evidence, the investigation will have to be conducted in a hurried atmosphere. Moreover, law enforcement officials will be dissuaded from reopening cases in light of the discovery of new evidence of guilt, even though prosecution would not be barred by the statute of limitations, because of a fear that a conviction would not stand in the face of a speedy trial claim.

Congress paid heed to these policy concerns when it enacted the Speedy Trial Act of 1974, 18 U.S.C. 3161 *et seq.*, "to give effect to the sixth amendment right to a speedy trial for persons charged with criminal offenses * * *." S. Rep. No. 93-1021, 93d Cong., 2d Sess. 1 (1974). In establishing strict time limits to govern the prosecutorial process once a defendant has been accused, Congress specifically addressed the situation where a charge is filed and then dismissed. Section 3161(d) provides that the time limits run anew if an indictment or information is dismissed on the defendant's motion, or if a complaint is dismissed or otherwise dropped prior to indictment, and the defendant is subsequently charged with the same offense.[24] Similarly, Section 3161(h)(6) provides that "any period of delay from the date the charge was dismissed [upon motion of the government] to the date the time limitation would commence to run as to the subsequent charge * * *" is excludable for computing the time within which a trial must commence. In its discussion of Section 3161(d), Congress explained the policy reasons that necessitate exclusion of these periods from speedy trial consideration: "To require a prosecutor to conform to indictment and trial time limits which were set by the filing of the original complaint in order to reopen a case on the basis of new evidence would be an insurmountable burden." S. Rep. No. 93-1021, *supra*, at 33.

The rules established in the Speedy Trial Act intelligently advance the interests protected by the Sixth Amendment and, in our view, reflect the proper interpretation of the constitutional provision.[25] The defendant's rights are safeguarded; the failure to measure the speedy trial period from the date of the initial arrest does not give the government an opportunity to circumvent the speedy trial requirement by successively dismissing and reinstituting a complaint or indictment for the same offense. Cf. *United States* v. *Avalos*, *supra*, 541 F.2d at 1108-1109 n.13. The Act prevents such an infringement of the speedy trial right because when a charge dismissed at the behest of the prosecutor is later reinstated, the time that has elapsed between the filing of the initial charge and its dismissal is included in considering the defendant's right to a speedy trial on the second indictment. See S. Rep. No. 93-1021, *supra*, at 38. This period prior to dismissal of an indictment by a prosecutor may also be appropriately considered in the constitutional speedy trial analysis when the charge is reinstituted. But there is no basis in either law or policy for including the period when no charge is pending in the speedy trial calculation.

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[24] 18 U.S.C. (Supp. III) 3161(d)(1) provides:

> If any indictment or information is dismissed upon motion of the defendant, or any charge contained in a complaint filed against an individual is dismissed or otherwise dropped, and thereafter a complaint is filed against such defendant or individual charging him with the same offense or an offense based on the same conduct or arising from the same criminal episode, or an information or indictment is filed charging such defendant with the same offense or an offense based on the same conduct or arising from the same criminal episode, the provisions of subsections (b) and (c) of this section shall be applicable with respect to such subsequent complaint, indictment, or information, as the case may be.

Sections 3161(b) and (c) generally require indictment to occur within 30 days of arrest and trial to occur within 70 days of indictment.

II

EVEN IF THE DELAY BETWEEN DISMISSAL OF THE CHARGES AGAINST RESPONDENT AND HIS SUBSEQUENT INDICTMENT IS PROPERLY INCLUDED IN THE SPEEDY TRIAL CALCULATION, RESPONDENT'S SIXTH AMENDMENT RIGHTS WERE NOT VIOLATED

If the Court agrees with our submission that a period when no charges are pending against an individual should not be included in the speedy trial calculation, it is clear that the court of appeals erred in dismissing the indictment on speedy trial grounds. In *Barker* v. *Wingo*, 407 U.S. 514, 530-533 (1972), this Court identified four factors that are relevant in assessing a claim under the Speedy Trial Clause: the length of the delay, the reason for the delay, the defendant's assertion of his rights, and prejudice to the defendant. The length of the delay is a "triggering mechanism"; if the delay is long enough that it is "presumptively prejudicial," analysis of the other factors is necessary to determine whether there has been a speedy trial violation. See *id.* at 530. If the pre-indictment delay here between October 1970 and January 1975 is not included in the calculus, it cannot seriously be contended that respondent's speedy trial rights have been violated. The period between preferral of the military charges and their dismissal is too short to trigger the *Barker* analysis. See Pet. App. 34a. And respondent has always conceded that the delay between his indictment and trial, primarily a result of his pretrial appeals, is not material for speedy trial purposes. See 531 F.2d at 202; Pet. App. 19a n.2.[26] Assuming *arguendo*, however, that the entire pre-indictment period is relevant to the speedy trial calculation, we submit that the court of appeals misapplied the *Barker* factors and erred in finding a Sixth Amendment violation.

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[25] These provisions generally embody recommendations of the American Bar Association. See ABA *Project on Standards for Criminal Justice, Speedy Trial* §§ 2.2(b), 2.3(f) (Approved Draft 1968).

A. Under The Circumstances Of This Case The Delay Between Respondent's Military Arrest And His Indictment Was Not Unreasonable

The period of delay from respondent's military arrest to his indictment is sufficiently long to be considered "presumptively prejudicial." This conclusion, however, does not establish a constitutional violation; it only touches off an inquiry into balancing the other *Barker* factors. The next factor in the *Barker* analysis is the reason for the delay. The Court in *Barker* explained the consideration to be given to different causes of a delay (407 U.S. at 531; footnote omitted):

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[26] Judge Murnaghan, in his statement on denial of rehearing, identified the "offending" period of delay as October 1970-January 1975, the precise period that we have contended must be excluded from the speedy trial calculation (Pet. App. 48a).

> A deliberate attempt to delay the trial in order to hamper the defense should be weighted heavily against the government. A more neutral reason such as negligence or overcrowded courts should be weighted less heavily but nevertheless should be considered * * *. Finally, a valid reason, such as a missing witness, should serve to justify appropriate delay.

There is no contention that any delay in this case was a deliberate attempt to hamper the defense. The court of appeals acknowledged this (531 F.2d at 205-206), and respondent has conceded this point in this Court (75-1892 Br. in Opp. 13). The courts below have asserted that a major portion of the delay was attributable to "negligence" (531 F.2d at 207) or "bureaucratic indifference" (Pet. App. 7a), which this Court has classified as "more neutral reason[s]" that weigh "less heavily" in the speedy trial calculus. *Barker* v. *Wingo*, *supra*, 407 U.S. at 531. Even these descriptions, however, unfairly characterize the government's actions in this case. As the dissenters below pointed out (Pet. App. 20a-22a, 41a-42a), all but a small portion of the period between the dismissal of the military charges and the return of the indictment was spent in diligent efforts to solve a complex crime. Both military and civilian authorities performed exhaustive investigations of circumstantial evidence while prosecutors reviewed whether the evidence adduced warranted prosecution. The courts have recognized that the complexity of a case is a factor that justifies what would otherwise appear to be a long delay. See, *e.g.*, *United States* v. *Enright*, 579 F. 2d 980, 990 (6th Cir. 1978); *United States* v. *Dreitzler*, 577 F.2d 539, 549-550 (9th Cir. 1978), cert. denied, 440 U.S. 921 (1979).

A close examination of the period of investigation shows that the pre-indictment delay here was not excessive. See Pet. App. 21a-22a, 41a-44a. A lengthy military investigation had concluded that the evidence available in October 1970 was not sufficient to warrant the court-martial of respondent. Accordingly, the CID engaged in a massive reinvestigation of the case, including attempts to locate the intruders described by respondent, which culminated in a 13-volume report transmitted to the Department of Justice in June 1972. Neither court of appeals panel seriously contended that the time required to complete this report constituted excessive delay.[27] After receipt of the report, several more months were required for Department of Justice personnel to digest its contents and suggest other lines of inquiry. In response to requests by the Department, the CID forwarded two supplemental reports, in November 1972 and August 1973. Later, when the case was brought before a grand jury, significant evidentiary discoveries were made that strengthened the prosecution's case (see page 7, *supra*). Thus, the period of delay criticized by the courts below was in fact principally a period of continuing efforts by the government to amass evidence and establish the identity of the murderer.

This is not to say that there was no unavoidable delay during this period; undoubtedly, the case could have been presented to the grand jury somewhat sooner than it was, if the decision-making process had been expedited.[28]

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[27] The court in *MacDonald I* found this CID investigation to be understandable and weighed against the government only the delay after June 1972. 531 F.2d at 206-207. The court below stated that "the most offending delay" was that between June 1972 and the commencement of the grand jury proceeding in August 1974 (Pet. App. 8a).

[28] In particular, the investigation of the murders was not materially advanced during the period of less than a year between the submission of the second supplemental CID report in August 1973 and the decision to empanel a grand jury. During this period, however, the decision to prosecute was being made as government officials debated whether the evidence and chances of obtaining a conviction warranted seeking an indictment.

But this noninvidious delay cannot be considered substantial in the circumstances of this case. See Pet. App. 42a. The complexity of this case and the severe consequences of seeking an indictment against respondent for these grave and extraordinary offenses justified the postponement of the grand jury investigation until the government had gleaned all available evidence and carefully considered all views as to the wisdom of seeking an indictment.[29] Thus, as the dissenters below concluded, the pre-indictment delay in this case was "well advised" (*id.* at 21a) and "not * * * excessive" (*id.* at 44a), and it carries little weight in the speedy trial calculation.

B. Respondent Made No Meaningful Demand for a Speedy Trial

The third of the *Barker* factors is the defendant's assertion of his right to a speedy trial. The court below erroneously gave strong weight to this factor, stating that respondent "consistently, after his discharge, contacted the Justice Department in an attempt to expedite the resolution of his case" (Pet. App. 8a).

This conclusion is based on a misunderstanding of the type of demand contemplated in *Barker*. Indeed, the court's conclusion highlights the incongruity of applying the Sixth Amendment analysis to the pre-indictment period involved here. Respondent could not demand a speedy trial between October 1970 and January 1975 because there were no charges pending against him that could be tried. See *Arnold* v. *McCarthy, supra*, 566 F.2d at 1383. Moreover, the correspondence from respondent's counsel to the Department of Justice in 1973 and 1974 cannot fairly be characterized as a demand that respondent be indicted.[30] These letters consisted of offers to submit respondent to interviews, neutral inquiries concerning the status of the government's investigation, and requests to terminate efforts to link respondent to the murders in light of the result of the Article 32 proceeding. See 531 F.2d at 201 n.6.

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[29] As the dissenters on rehearing pointed out (Pet. App. 43a), the government cannot be faulted for failing to prosecute as soon as one person took the position that it should seek an indictment. On the contrary, the government's hesitancy to proceed without giving careful consideration to other views "is to be commended, not condemned." *Ibid.* If, as the court of appeals suggests (*id.* at 8a), the prosecution is to be penalized for delay caused by resolving an internal debate over whether the case should be prosecuted, hasty prosecutorial decisions will be encouraged, which "would have a deleterious effect both upon the rights of the accused and upon the ability of society to protect itself." *United States* v. *Lovasco*, *supra*, 431 U.S. at 791, quoting *United States* v. *Ewell*, *supra*, 383 U.S. at 120.

C. Respondent Has Not Demonstrated a Substantial Likelihood of Prejudice on the Basis of the Facts Developed During the Trial

The final factor in the *Barker* balancing analysis is prejudice to the defendant from the delay. Prejudice is to be assessed in light of the three interests of a defendant that the speedy trial right is designed to serve: "(i) to prevent oppressive pretrial incarceration; (ii) to minimize anxiety and concern of the accused; and (iii) to limit the possibility that the defense will be impaired." *Barker* v. *Wingo, supra*, 407 U.S. at 532. It is manifest that the first two interests offer no support to respondent's speedy trial claim. Except for a short period of very limited restriction before the dismissal of the military charges in October 1970, respondent's freedom was never infringed prior to trial, and he was not hindered in pursuit of his personal and professional interests. Compare *id.* at 532-533. As to the second factor, although respondent undoubtedly suffered some anxiety and concern over the ongoing investigation, his anxiety was surely less than that of a person awaiting trial against whom formal charges are pending.[31] The district court specifically found on this point that "[t]he record would not support a finding that [respondent] has suffered great anxiety and concern by reason of the pre-indictment delay in this case" (Pet. App. 55a).

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[30] Of course, a suspect has no right to demand that an investigation be terminated or that he be speedily arrested or indicted. See *United States* v. *Lovasco, supra*, 431 U.S. at 790-796; *Hoffa* v. *United States*, 385 U.S. 293, 310 (1966).

The most serious form of prejudice is impairment of the defense at trial. As this Court explained in finding that respondent could not appeal the denial of his speedy trial motion before trial, *United States* v. *MacDonald*, 435 U.S. 850, 858 (1978), this facet of the inquiry requires a careful assessment of the facts of the case as they are developed at trial. An assessment before trial of impairment of the defense by reason of delay is only "speculative." *Ibid.* Thus, although the defendant need not show that he would have been acquitted but for the delay, he must show some reasonable basis for concluding that the delay significantly impaired his defense.[32] Yet apart from general allegations that witnesses' memories would be eroded, respondent's pretrial motions to dismiss on speedy trial grounds (J.A. 41-49) advanced no specific basis for his claim of impaired defense; moreover, in his post-trial motion to dismiss (J.A. 170), he made no reference to any aspect of the trial in which the delay allegedly impaired his defense. The district court, after noting that it had been alert throughout the trial to detect the possible existence of prejudice resulting from the delay (Pet. App. 53a), found that respondent's ability to defend the case adequately was not impaired in any respect (*id.* at 55a-56a).

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[31] Because any individual subject to pending charges suffers anxiety and concern, this factor ordinarily does not weigh heavily in the *Barker* analysis. See, *e.g.*, *United States* v. *Hill*, 622 F.2d 900, 910 (5th Cir. 1980); *United States* v. *Van Dyke*, 605 F.2d 220, 226 (6th Cir.), cert. denied, 444 U.S. 994 (1979); *United States* v. *Noll*, 600 F.2d 1123, 1128 (5th Cir. 1979).

[32] For example, when the claim of prejudice is based on the unavailability of a witness, the defendant must show that the witness could have supplied material evidence for the defense. See *Jones* v. *Morris*, 590 F.2d 684, 687 (7th Cir. 1979); *Smith* v. *Mabry*, 564 F.2d 249, 253 (8th Cir. 1977), cert. denied, 435 U.S. 907 (1978). See generally *Fourth Circuit Review—Misapplication of the Constitutional Rights to a Speedy Trial*, *supra*, 38 Wash. & Lee L. Rev. at 593-595 nn.253, 257.

The contrary conclusion of the court of appeals is unsupported by the record. Despite this Court's instructions in *MacDonald*, the court below minimized the importance of the evidence as actually developed at trial, finding that it "confused rather than clarified the question of actual prejudice at trial" (Pet. App. 9a). Instead, the court rested its decision primarily on general speculation about problems that are always present when there is delay. The court conjectured that, given the possibility that during preparation for trial the prosecutors "helped fill lacunae of recollection" by reminding each witness of his earlier statements, "[t]he intervening period of over nine years rendered it virtually impossible for [respondent] to prove the recollection of each witness to see if they were fuller than or different from what he had stated when the statement was taken" (Pet. App. 10a).

This speculation by the court does not support its conclusion that respondent's defense was prejudiced by a period of unjustified government delay. First, even assuming that the court of appeals was correct in finding that the government "negligently" delayed for a two-year period, there would be no reason to ascribe to this period any loss of recollection sustained by witnesses over the nine-year period before trial. Moreover, nothing in the record supports the speculation that any testimony by prosecution witnesses was influenced by pretrial preparation and was not the result of independent recollection. Indeed, as the court acknowledged (*id.* at 16a), the prosecution's case consisted almost exclusively of circumstantial physical evidence and scientific testimony interpreting the evidence. The reliability of such evidence, based largely upon reports made contemporaneously with the analyses of the physical evidence, does not diminish with the passage of time, nor does the ability of defense experts to challenge its significance.[33]

The court of appeals also observed that, as a result of the delay, respondent was likely to have been prejudiced by the "almost certain memory erosion" of all the witnesses (Pet. App. 14a). But this type of nonparticularized assertion of faded memories can be made whenever there is delay and provides no basis for a finding of prejudice in the context of a Sixth Amendment speedy trial claim. See, *e.g.*, *United States* v. *Edwards*, 577 F.2d 883, 889 (5th Cir. 1978); *United States* v. *Avalos*, *supra*, 541 F.2d at 1116 (collecting cases). The only specific item of prejudice relied upon by the court below is its assertion that the delay was the probable cause of Helena Stoeckley's testimony that she could not recall her whereabouts during the time the murders were committed. Because Stoeckley had made vague and contradictory remarks to third parties on several occasions in the past that indicated that she was present in respondent's apartment during the murders,[34] the court found that there was a "substantial possibility" that, had the trial been conducted earlier, Stoeckley "would have testified to being present in the MacDonald home during the dreadful massacre," and therefore the testimony she gave at trial "had a great potential for prejudice" (Pet. App. 11a).

The court's speculation that the delay was the probable cause of Stoeckley's failure at trial to remember her activities on the night of the murders does not withstand analysis. First, it defies common sense to conclude that the mere passage of time could erase the memory, if any in fact existed, of so significant an event as being present at these murders. Moreover, as the dissenters on rehearing found (Pet. App. 46a), the record clearly establishes that Stoeckley's memory gap existed from the outset; it was not "a condition which developed as the result of any delay in either the investigation or the prosecution of [respondent]."

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[33] Respondent presented the testimony of five expert witnesses who challenged aspects of the testimony of the government's expert witnesses (*e.g.*, Tr. 4900, 4921-4927; 5006-5072; 5128-5218, 5249-5290; 5333-5370, 5405-5415, 5417-5434).

[34] Stoeckley's statements to various individuals suggesting her possible involvement in the murders are set out at pages 17-19 n.* of respondent's Brief in Opposition. Stoeckley also made several remarks to many of the same individuals disclaiming her involvement in the murders or any recollection of her whereabouts on that night. See J.A. 14-15, 22 (Posey); J.A. 133 (Gaddis); J.A. 138-141 (Brisentine); J.A. 152-153 (Beasley).

Stoeckley herself explained at trial that her inability to recall her activities during the early morning hours of February 17, 1970, was caused by her consumption the previous evening of large quantities of drugs (J.A. 52-54). This explanation is corroborated by earlier statements she had made shortly after the murders and in several subsequent conversations with acquaintances and investigators. The day after the murders, she stated to a local policeman that "[i]n my mind, it seems that I saw this thing happen," but she also explained that she was "heavy on mescaline" and could not recall anything that happened on the night of the murders (J.A. 149, 152-153). About one week later, Stoeckley told William Posey, her neighbor, that she could not recall what she had done or where she had been during the time of the murders because she was "stoned out that night" (J.A 11-15). She reiterated these statements in a subsequent conversation with Posey shortly thereafter (J.A. 22). When interviewed by a CID agent in August 1970, Stoeckley stated that she could not recall her activities on the night of February 16-17, other than driving aimlessly with a male companion, because she had been using marihuana (J.A. 24-25). In April 1971, Stoeckley told an investigator that she did not remember her whereabouts during the early morning hours of February 17 due to a "mental block" and that during that period she was disoriented as the result of drug usage (J.A. 138-139). Thus, the record indicates that Stoeckley's testimony at trial was the result of a pre-existing gap in her memory apparently caused by drug abuse. See Pet. App. 25a-27a.[35] As Judge Bryan found (*id.* at 25a-26a), "[n]othing in the record * * * warrants the assumption that Stoeckley would have or could have given the testimony the majority would ascribe to her had the Government secured its indictment earlier." [36]

In sum, application of the *Barker* factors here does not indicate a speedy trial violation. The bulk of the delay was justified by the complexity of the investigation and the gravity of the crimes, and only a small portion of the delay could be characterized as even negligent. More importantly, the record reveals no prejudice whatsoever to the defense. In these circumstances, it is clear that the court of appeals erred in dismissing the indictment. Respondent was found guilty beyond a reasonable doubt of three murders. To "absolve[] him forever of his hideous offense[s]" (Pet. App. 18a) because of a lack of diligence by the prosecution prior to indictment is not a step to be taken lightly. The determination of Congress that no statute of limitations is applicable to first-degree murder (18 U.S.C. 3281) reflects the view that society's interest in convicting the perpetrator of such an offense is so substantial that prosecution is not to be foreclosed regardless of the passage of time. In the absence of any prejudice from the delay, there is certainly no constitutional impediment to this legislative judgment.[37]

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[35] Respondent has pointed to some extra-record post-trial statements allegedly made by Stoeckley that also suggest her possible involvement in the murders. Br. in Opp. 21 n.*, 38A-40A. These statements provide further evidence from Stoeckley herself undercutting the suggestion that her memory gap at trial was a result of the delay. See Br. in Opp. App. 39A.

[36] Because respondent never alleged in his speedy trial motions that he was prejudiced by Stoeckley's memory gap, the trial court did not address the significance of her testimony in connection with its ruling on the speedy trial motion. In connection with its ruling that Stoeckley's prior out-of-court statements were properly excluded, however, the court made the following assessment (Pet. App. 58a):

> The court gained the unmistakable impression which it believes was shared by the jury that this pathetic figure was suffering from drug-induced mental distortion and that she could be of no help to either side in the case.

CONCLUSION

The judgment of the court of appeals should be reversed.

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AUGUST 1981

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[37] It follows, *a fortiori*, from the analysis above that respondent's Fifth Amendment due process rights were not violated by the delay. As we noted in our petition (Pet. 19-22), pre-indictment delay violates the Fifth Amendment if it both causes actual prejudice to the defense and is the product of fundamentally unfair government conduct—for example, if the delay is an intentional device to gain a tactical advantage over the accused. See *United States* v. *Lovasco*, *supra*, 431 U.S. at 788-796 & n.17; *United States* v. *Marion*, *supra*, 404 U.S. at 324; see also, *e.g.*, *United States* v. *Elsbery*, *supra*, 602 F.2d at 1059. The analysis of prejudice in the Sixth Amendment context (pages 37-42, *supra*) makes clear that respondent cannot meet the more stringent "actual prejudice" test of the Fifth Amendment. Indeed, the court below implicitly acknowledged that no actual prejudice had been shown (Pet. App. 11a, 16a). Moreover, as we noted earlier (page 34, *supra*), respondent and the court of appeals have conceded that the delay here was not the result of intentional government action designed to hamper the defense.

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CLERK

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1980

UNITED STATES OF AMERICA,
Petitioner

vs.

JEFFREY R. MACDONALD,
Respondent

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR RESPONDENT

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No. 80-1582

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1980

UNITED STATES OF AMERICA,

Petitioner

vs.

JEFFREY R. MACDONALD,

Respondent

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR RESPONDENT

OPINIONS BELOW

The pretrial opinion of the court of appeals (Op.App. 1A-35A) is reported at 531 F.2d 196. Its post-trial opinion

(Pet.App. 1a-27a) is reported at 632 F.2d 258. The opinion and order on denial of rehearing (Pet.App. 29a-49a) is reported at 635 F.2d 1115.[1]

STATEMENT

Although the legal issues before this Court relate to the denial of speedy trial, it is necessary to provide a synopsis of the background facts in order to assess the prejudice attributable to the unreasonable delay that the court below charged to the government. We first set forth a summary of facts relating to the crime; secondly, the procedural history of the case; thirdly, a summary of the findings and conclusions of the court below.

Factual Background

In February 1970, Dr. Jeffrey R. MacDonald was a 26-year-old captain serving as a medical officer assigned to a Green Beret unit at Fort Bragg, North Carolina. He lived with his wife, Colette, who was pregnant at the time, and his two daughters, Kimberly (aged 5) and Kristen (aged 2) in a small apartment on the Army base.

In the early morning hours of February 17, Mrs. MacDonald and the two children were murdered. Each had suffered multiple stab wounds and beatings with a club. Dr. MacDonald himself had suffered more

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[1] The questions presented and the facts relating to the jurisdiction of this Court are set forth in the government's brief.

Respondent's brief uses the following designations. "Pet.App." refers to the appendix to the government's petition for certiorari; "Op.App." to the appendix to respondent's brief in opposition; "J.A." to the printed joint appendix; "Tr." to unprinted portions of the trial transcript; "C.A.App." to the joint appendix before the court of appeals. All of the above material is before this Court.

than seventeen wounds, including a life-threatening stab wound of the chest which caused a partial lung collapse, puntures on his arms and stomach, and bruises to the head.

Dr. MacDonald, the only witness to testify to the circumstances of the attack, gave the following account. (*See* Tr. 6560-6615.)

He spent the evening of February 16th at home with his two children while Colette attended an evening class at a local college. He put the two children to bed, Kristen at about 7:15, Kimberly at about 9:00. Colette returned home at about 9:40 and retired at about midnight. Dr. MacDonald watched television in the living room until about 1:00 a.m. When he went to the master bedroom, he found that Kristen had gotten into bed with her mother. He carried Kristen to her own room and then discovered, upon returning to the master bedroom, that she had wet his side of the bed. He thereupon secured an afghan and went to the living room to sleep on the couch.

His next recollection, after falling asleep, was that he heard Colette screaming. As he started to rise, he saw several people at the foot of the couch. He made out that there were four persons in the room — one black male, two white males and one white female. He was promptly attacked, and he struggled with his assailants. He heard the woman say, "Acid is groovy; kill the pigs." During the struggle his hands became bound up in his pajama top. At some point in the brief affray, he felt a sharp pain in his right chest. Also, he fleetingly observed that the woman had blond hair, that she was wearing a white floppy hat and boots, and that there was a flickering light on her face as if she were holding a candle.

The next thing he remembers, he was lying on the floor and the house was quiet. He got up and went to the master bedroom. Colette was on the floor. Blood was profuse. He removed the pajama top, which was still on his wrists, and pulled a knife from Colette's chest. He attempted mouth-to-mouth resuscitation, but found that air was coming from the wounds in her chest. He checked Colette's pulse but could detect no sign of life.

Dr. MacDonald then went, in turn, to the children's rooms. They, too, were covered with blood and proved unresponsive to attempts at resuscitation.

Although the exact sequence of events has never been clear to him, at some point he went into the bathroom. He returned to Colette. He may have again attempted artifical respiration. At another point, he reached for his pajama top and placed it in on Colette's chest and placed some other item on her as well. He does not know why he tried to cover her, only that he did.

He picked up the phone in the master bedroom and dialed the operator to call for help. When the operator insisted on knowing whether he was calling from on-Post or off-Post, he dropped the phone. Noticing that the back door (which opens off a utility room next to the master bedroom) was ajar, he went to that door. He looked out, did not see anything or anyone, and returned to check once again his wife and children.

The next thing he recalls is being on the phone in the kitchen. He picked up the phone, and, without having dialed, heard a female voice ask if he was Captain MacDonald. He said he was, that people had been stabbed and were dying, and that help was needed. Then a sergeant came on the phone and Dr. MacDonald again said that people were dying. The next thing he knew, there were people standing over him. He was lying next to

Colette in the master bedroom and a military policeman was giving him mouth-to-mouth resuscitation.[2]

When he revived, Dr. MacDonald gave the military police the following description of the four intruders: one black male wearing an Army field jacket with sergeant stripes on the sleeve, two white males, and a blond female wearing a floppy hat, boots and a short skirt, and possibly carrying a candle (Tr.1503-1505).[3]

The day after the murders, a Fayetteville police officer, Beasley, approached Helena Stoeckley, a young woman who was well known to him because he had regularly used her as a drug informer. His reason was that "you and the people you are with fit the description that was given out" (Tr. 5741).[4] Stoeckley responded, "In my mind, it seems that I saw this thing happen," adding she had been "heavy on mescaline" (Tr. 5742). Thereafter, Stoeckley, over the course of time, made out-of-court admissions to six other persons implicating herself in the MacDonald murders. We deal more fully in the Argument, *infra*, with the Stoeckley story — who she was, the various admissions against penal interest that she made, and the circumstances that tend to corroborate them. At this juncture, we note that on the witness stand in 1979 she stated that she no longer remembered where she had been and what had occurred in the early morning of February 17, 1970 (J.A. 51-52, 54-55). She also stated that she could not recall the admissions attributed to her by the seven auditors who heard her admissions against penal interest. *Id.* The district court, however, did not permit the jury to hear any of Stoeckley's out-of-court admissions (heard by the court on *voir dire* and reproduced at J.A. 121-169), ruling against respondent's contentions that they were admissible both as admissions against penal interest and for purposes of impeaching Stoeckley's denial of recollection.

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[2] Dr. MacDonald was found unconscious when the military police arrived on the scene (Tr. 1406).

[3] Sergeant Mica, one of the military police who answered the call from Dr. MacDonald, had observed a woman with a floppy hat on the corner of South Lucas and Honeycutt Road as he drove to the MacDonald residence. This was shortly before 4:00 a.m. He would have investigated further but for the fact that he was on an emergency call (Tr. 1450–52).

It is clear that Helena Stoeckley (see discussion in text immediately following) was abroad at that hour. She was observed by a neighbor (one Posey) as she alighted from a car in front of her apartment at about 4:30 a.m. The car was a blue Mustang that had been there before, and there were at least two other people in the car (Tr. 5990–92; J.A. 155–156).

Stoeckley herself confirmed that she came home at about 4:30 or 5:00 a.m. on February 17th. She testified that she arrived in a blue car in the company of three soldiers, but did not know their names. She also said she was unable to recall where she had been between midnight, when she remembered leaving her place, and 4:30 when she returned (J.A. 50, 53-54).

The government, for its part, disclaimed any ability to show that Dr. MacDonald had motive to commit the crimes (Tr. 7293-94), relying solely upon the discovery and analysis of various items of physical evidence at the scene. Its theory was that various aspects of respondent's story were inconsistent with the physical evidence, and that Dr. MacDonald had inflicted his own wounds and staged evidence of an intrusion of outsiders as a cover for his own crimes.[5] Ultimately, then, the case came down to an evidentiary clash between Dr. MacDonald's account and the government's hypothetical reconstruction of the crime.[6]

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[4] Beasley knew that Stoeckley frequently wore a blond wig and a floppy hat during the period in question. He also knew that she associated with a black male who invariably wore a fatigue jacket with "E-6 stripes" (Tr. 5832–33). Stoeckley's next door neighbor, Posey, testified that Stoeckley's blond wig, white boots and floppy hat were "her trademark" in the "hippie" group in which she traveled (Tr. 5986–87). Stoeckley testified that she burned her blond wig on about February 19 or 20, 1970, "because it connected me with the murder" (J.A. 77–78), and that she threw her white boots in a trash can because the "heel came off one of them" (J.A. 78).

Procedural History

Promptly after the crime occurred, an investigation was undertaken by the Army's Criminal Investigation Division (CID), the FBI and the Fayetteville (N.C.) police department (Op.App. 4A-5A). A team of experts from the CID laboratory examined the crime scene for a week and collected the items of physical evidence which thereafter formed the basis of the government's case in both the military and civilian criminal proceedings. The laboratory analysis of the evidence was completed within a matter of weeks. On April 6, 1970, Dr. MacDonald was informed that he was a suspect and was restricted to quarters. On May 1, 1970, he was formally charged with the murders, placed under arrest, and confined under armed guard to his quarters (Op.App.4A). Shortly thereafter, an Investigating Officer, Colonel Warren V. Rock, was appointed, pursuant to Article 32, Uniform Code of Military Justice, 10 U.S.C. § 832, to examine the charges against Dr. MacDonald. The evidence presented by the government at the military justice proceedings was wholly circumstantial, consisting of physical artifacts found at the crime scene. Fifty-six witnesses, including respondent, were heard by the Investigating Officer (Op.App.5A). At the conclusion of the proceedings in October 1970, Colonel Rock prepared a 90-page report finding: (1) that the charges against Dr. MacDonald were "not true," and (2) that there was sufficient evidence against a woman named Helena Stoeckley to require an investigation by civilian law enforcement agencies of her involvement in the murders and the assault on Dr. MacDonald (Op.App.5A).

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[5] In its first opinion in this case the court of appeals observed (Op.App.21A) that the government's case depended on a "detailed reconstruction of the murder scene." It explained (*id.*) that the "position of a flower pot, the way MacDonald's pajama top was folded, the condition of the sheets in the bedroom, are but examples of the many questions about physical evidence that the government's case turns on." In his appeal subsequent to the trial, Dr. MacDonald challenged the admissibility of certain demonstrations attempted by the government's investigators on the ground that they were seriously flawed. In light of its disposition of the case on Sixth Amendment grounds, the court below refrained from disposing of these and other issues.

[6] This, of course, brings sharply into focus respondent's claim, discussed below in relation to respondent's constitutional arguments, that the defense was critically prejudiced by being deprived of the opportunity to bring to the jury the words of the one known living witness, other than Dr. MacDonald, who admitted to presence at the scene of the crime.

The charges against Dr. MacDonald were thereupon dismissed by the Army. Shortly thereafter, he was honorably discharged.[7] In January 1971, however, the Justice Department requested that the CID reopen the matter. The ensuing investigation by the CID was completed in December 1971, eleven months later. It had interviewed numerous witnesses and re-examined the physical evidence in crime laboratories (Op.App.6A). No new physical evidence was uncovered (Op.App.6A, 17A-

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[7] Subsequently he moved to Southern California where he lives today, working as Director of Emergency Medicine at a major hospital.

18A). The CID then took six more months to assemble its findings and write a report, which was submitted to the Justice Department in June 1972 (Op.App.6A).

From June 1972 until August 1974, when a grand jury investigation was begun, there was no significant investigative activity in the case (Op.App.17A-18A, Pet.App.4a-5a), although Dr. MacDonald, in person and through letters from his attorneys, urged that the Justice Department complete its investigation and offered his full cooperation. Attorneys in the Justice Department debated whether to prosecute Dr. MacDonald, but no action was taken for two years, until 1974, when a new Justice Department attorney was assigned to the case. He began to present evidence to the grand jury (before whom respondent testified) in August 1974 (Op.App.6A, Pet.App.8a).

On January 24, 1975, an indictment was returned[8] and on January 25, 1975 respondent was again arrested. He promptly filed motions to dismiss the indictment on speedy trial and double jeopardy grounds. The district court denied those motions and the court of appeals stayed the trial pending hearing of an appeal (Op.App.1A).

In January 1976, the court of appeals reversed the district court's order denying respondent's speedy trial motion. 531 F.2d 196 (1976). This Court granted the government's petition for certiorari and reversed the court of appeals on the ground that the district court's order was not appealable in advance of final judgment in the main case. 435 U.S. 850 (1978).[9] On remand, the court of appeals ruled that a trial on the federal indictment would not violate the Double Jeopardy Clause (585 F.2d 1211 (1978)) and returned the case to the district court. Following a jury trial in the summer of 1979, respondent was convicted. The district court denied a motion to vacate the conviction and dismiss the indictment on speedy trial grounds. Respondent appealed, renewing his speedy trial claim and raising additional issues.

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[8] In light of the decision in Furman v. Georgia, 408 U.S. 238 (1972), it appeared clear that a death sentence could no longer be imposed under 18 U.S.C. § 1111 (first degree murder). It was accordingly questionable whether the limitations provision of 18 U.S.C. § 3281 (no limitation for "any offense punishable by death") was applicable. If not applicable, the governing period was five years. 18 U.S.C. § 3282 (offenses "not capital"). The indictment was returned a few weeks before the expiration of that period.

On this second appeal to the Fourth Circuit, the court below (a different panel from that which heard the first appeal) again sustained respondent's claim of denial of the right to a speedy trial. 632 F.2d 258 (1980). A divided court of appeals denied the government's application for rehearing en banc. 635 F.2d 1115 (1980). On May 26, 1981, this Court granted certiorari.

Findings and Conclusions of the Court of Appeals

The reasoning of the decision below, reflected in the opinions of both panels, is that the Sixth Amendment right to speedy trial was triggered by the arrest and formal charging of the respondent by the military on May 1, 1970; that, although that charge was dropped by the Army in October 1970, investigations directed at Dr. MacDonald were soon resumed by the Army CID, at the request of the Justice Department, in January 1971; that thereafter Dr. MacDonald continued to be subject to extensive and notorious publicity and investigation, to public obloquy, to the stress and anxiety of threatened prosecution, and to the need to retain the services of counsel in his defense; and that, in these circumstances, the government was chargeable with periods of inexcusable delay, though not with any period of delay reasonably related to the pursuit of legitimate prosecutorial objectives.[10]

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[9] This Court explicitly noted that it was not reaching the merits of the claim. 435 U.S. at 863, n.9.

Having concluded that the speedy trial provision of the Sixth Amendment was activated in May of 1970 and that it continued to be operative, the court of appeals examined the question of violation from the standpoint of the four factors set forth by this Court in *Barker v. Wingo*, 407 U.S. 514, 530 (1972): "Length of delay, the reason for the delay, the defendant's assertion of his right, and prejudice to the defendant."

Length of Delay. From the date of the crime (February 1970) until the grand jury proceedings were initiated (August 1974), there was an interval of more than four and one-half years. Although the court of appeals considered the provision for speedy trial activated by the action of the military in arresting and charging Dr. MacDonald on May 1, 1970,[11] it regarded as most critical the period from June 1972 until August 1974 (Op.App.17A;

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[10] The court below found, *inter alia*, that the termination of the Article 32 proceeding did not "dispel the effects of the government's initial accusation" (Op.App.13A); that the "government's efforts to convict" Dr. MacDonald persisted (Op.App.14A); that respondent was subjected to "extremely intrusive" publicity and to great personal pressures and anxiety (Pet.App.6a,16a), "demonstrated by the expense and concern he expended in attempting to have the charges resolved" (Pet.App.16a).

[11] "The military arrest was equivalent to civilian arrest" and respondent was held "to answer a criminal charge" (Pet.App.4a). The court below further stated (*id.*) that the Sixth Amendment "secures an accused's right to a speedy trial against oppressive conduct by the government in its single sovereign capacity, regardless of the number and character of the executive departments that participate in the prosecution."

Pet.App.4a-5a). As noted above, the military charges were dismissed in October 1970. In January 1971, the Department of Justice requested the Army CID to conduct a reinvestigation. The CID took eleven months, until December 1971, to do so, and an additional six months, until June 1972, to submit its report. From that point until the start of the grand jury proceedings in August 1974, there was a hiatus of more than two years.[12]

Reason for Delay. "The Justice Department was in possession of all the evidence from June 1972" (Pet.App.5a). The delay that followed resulted from

> . . . either a disagreement between two groups in the Justice Department as to whether the case should be prosecuted, or just simple government bureaucracy (the contention of the involved Assistant U.S. Attorney) [Pet.App.8a].[13]

"[T]he government's calloused and lackadaisical attitude . . . was solely responsible for at least the last two years of delay" (Pet.App.16a). This was an "irresponsible administration of justice." *Id.*[14]

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[12] A chronology is set forth at Op.App.36A-37A.

[13] Referring to this same period of delay (one which the first panel of the court of appeals had likewise found unreasonable Op.App.18A), Assistant to the Solicitor General Kenneth S. Geller, stated to this Court when the case was previously here (Transcript of oral argument before this Court, January 9, 1978):

> Now during that two or two and a half years, there were two prevailing views within the Government. One group of attorneys thought that the case should be brought to a Grand Jury immediately, with a view toward bringing charges against Respondent. Another group of attorneys, while also convinced that Respondent was guilty, frankly, couldn't believe that we could convince the jury of that.

Defendant's Assertion of His Right. "There is no question but that MacDonald vigorously pursued his right to a speedy disposition of the charges against him. He gave statements to the CID while still in the military and testified under cross-examination at the military hearing. He waived immunity and testified before the grand jury when it was finally convened, and consistently, after his discharge, contacted the Justice Department in an attempt to expedite the resolution of his case" (Pet.App.8a).[15]

Prejudice to the Defendant. The findings of prejudice have two aspects: those that relate to the burdens imposed upon respondent by virtue of the government's delay in proceeding with the case and those that affect the fairness of the trial itself. With respect to the first, the court below found that during the five-year pre-indictment period Dr. MacDonald labored "under a cloud of suspicion" (Pet.App.16a); that "extremely intrusive publicity" interfered with his life and affairs" *(id.)*; that, "from a practical standpoint", the effects of the government's "initial accusation" continued unabated despite the Army's dismissal of its charge since "the government's efforts to convict" openly persisted (Op.App.13A-14A); and that "the personal pressure and anxiety" generated by the threatened prosecution are "demonstrated by the expense and concern [Dr. MacDonald] expended in attempting to have the charges resolved" (Pet.App.16a). Addressing itself to the trial itself, the court of appeals observed that there are peculiar hazards for a defendant in dealing with a hypothetical reconstruction of a crime and in combatting "an array of technical evidence. The technical witnesses frequently are relying on scientific speculation and trial and error" (Pet.App.16a, n.7). The difficulty of examining the basis of their claims and observations is aggravated when memories have faded and the witnesses rely on statements or writings made years before. "The risk to MacDonald," the court stated (Pet.App.10a), "was simply too great that, in preparations *prior to the testifying* of each witness, the prosecutors helped fill lacunae of recollection, and assured consistency of support for their theory of the case . . ." *Id.* (italics in original) The length of the intervening period "rendered it virtually impossible for MacDonald to probe the recollections of each witness . . ." *Id.*

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[14] The first panel (with whose findings the second panel stated its full agreement, Pet.App.4a,7a,49a) had stated that the delay between mid-1972 until the return of the indictment in January 1975 must be attributed to the government's "indifference, negligence or ineptitude" (Op.App.19A).

[15] Two of the letters written by Dr. MacDonald's trial attorneys to the Justice Department in the course of his efforts to secure expedition are quoted at Op.App.6A-7A, notes 5 and 6.

Dealing with the claim of witness Helena Stoeckley that she did not recall her whereabouts or activities during the critical hours of February 17, 1970, the court of appeals found that the failure of Stoeckley to verify "MacDonald's own version of a Manson-like intrusion . . . may well have been disastrous to the defense" (Pet.App.11a-12a). "Had Stoeckley testified as it was reasonable to expect she might have testified, the injury to the government's case would have been incalculably great" (Pet. App.12a). The opinion continued (*id.*):

> The possible reasons why Stoeckley did not testify are several. But the reason she asserted under oath was failure of memory. The government's inexcusable delay of over two years' duration cannot be eliminated as a potential — indeed a probable — cause of memory lapse.

Finally, the court below pointed out that the defense was frustrated in its attempt to introduce Stoeckley's numerous admissions against penal interest (Pet.App.12a-13a, at n.6):

> Efforts of MacDonald to supply the deficiency of Stoeckley's memory by introducing hearsay testimony from those she had told stories which placed her on the scene on the night of the crimes were thwarted by government objections sustained by the district judge on the basis of Fed. Rules of Evid. 403, 804(b)(3). We have no occasion to question the correctness of the judge's evidentiary rulings. With hindsight, however, the government prosecutors may rue having prevented curative action for one potentially devastating prejudicial consequence of the government's unwarranted delay and concomitant failure to move ahead in a fashion to insure to MacDonald a speedy trial.[16]

SUMMARY OF ARGUMENT

I.

The court of appeals rejected the government's contention that a hiatus between the dismissal of a criminal charge and its reinstitution would "never count" for purposes of applying the Sixth Amendment's guarantee of a speedy trial. Its conclusion that a particularized period of delay did count in the instant case rests upon findings that the initial charge was accompanied by extraordinary publicity; that the dismissal of that charge was followed by open and active reinvestigation directed at Dr. MacDonald; that the effects of the public accusation were not dispelled, but continued to bear heavily upon the accused; that, after completing its lengthy reinvestigation, the government took an additional period of more than two years before deciding to proceed with the case; that "at least the last two years of delay" was inexcusable and irresponsible; and that the government's conduct, in addition to imposing severe burdens during the pretrial period, prejudiced the defense at the trial proper. That ruling is protective of interests long recognized by this Court as lying at the core of the speedy trial guarantee: "to minimize anxiety and concern accompanying public accusation" and "to limit the possibilities that long delay will impair the ability of an accused to defend himself." *United States v. Ewell,* 383 U.S. 116, 120 (1966). It is also fully consistent with *United States v. Marion,* 404 U.S. 307 (1971). *Marion*'s holding that delay preceding a public accusation is challengeable only under the due process clause does not warrant a conclusion that the prosecution can avoid the demands of the Sixth Amendment, even though it has made a public accusation, by the expedient of dismissing a charge and reinstating it at leisure.

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[16] We advert to the substance of these admissions, heard by the district judge on *voir dire*, in Point II of the Argument *infra*.

The ruling below in no way inhibits the government's pursuit of legitimate prosecutorial objectives. This is evidenced by the court's care in excluding from consideration all of the time consumed by the government's lengthy reinvestigation. To hold, however, that the government, having set a prosecution in train, is excused from all requirements of due diligence if it interrupts the formal proceedings, would ignore the protected interest of the affected individual. It would also disserve society's interest in the prompt administration of justice. Indeed, it would invite widespread abuse if the government were allowed "to circumvent the speedy trial requirement by successively dismissing and reinstating a complaint or indictment for the same offense," *United States v. Avalos,* 541 F.2d 1100, 1108-1109, n.13 (5th Cir.1976). This view, reflected in the opinion below, is widely supported by decisions of other federal courts and of numerous state tribunals.

II.

Although the court below found it unnecessary, in light of its Sixth Amendment ruling, to decide whether the prejudice caused by the government was also sufficient to make out a violation of due process, its findings and the supporting record show that Dr. MacDonald was in fact denied the elements of a fair trial.

The government's case rested entirely on a hypothetical reconstruction of the crime. Yet, as the court found, there was "almost certain memory erosion" on the part of the government's investigators. This "rendered it virtually impossible" for the defense to probe their recollections and to test the premises and assumptions upon which their "scientific speculation" rested. "The risk to MacDonald was simply too great that, in preparations *prior to the testifying* of each witness, the prosecutors helped fill lacunae of recollection" in order to assure "consistency of support for their theory of the case. . . ."

Equally important was the impact of delay upon the defense's ability to develop its affirmative case. Dr. MacDonald's defense was that the crime was committed by four intruders and that he was the sole survivor of a murderous assault upon his family. His description of the female intruder was sufficient to lead a local police officer to Helena Stoeckley. Stoeckley promptly acknowledged a connection with the crime. Thereafter, she made admissions placing herself on the scene, or otherwise implicating herself, to six other persons (acquaintances, friends and law officers). Numerous facts and circumstances provided corroboration of her admissions. At the trial, however, Stoeckley denied recollection of events during the critical hours of February 17, 1970, when the crime occurred. The court below found that her failure to verify Dr. MacDonald's account from the witness stand "may well have been disastrous to the defense;" that, had she testified "as it was reasonable to expect she might have testified, the injury to the government's case would have been incalculaby great;" that "the reason she asserted under oath was failure of memory;" and that the government's inexcusable delay was a "probable cause" of the defense's inability to get an account from her when she appeared before the jury.

The consequences of Stoeckley's unavailability as a witness might have been allayed, if not cured, had the jury heard her out-of-court declarations. At the government's urging, however, the trial court excluded the testimony of those who had heard Stoeckley's admissions against penal interest. This ruling was indefensible, both as a matter of interpretation of the Federal Rules of Evidence and under the constitutional standard set forth in *Chambers v. Mississippi,* 410 U.S. 284 (1973). The prosecution thus succeeded in compounding the prejudice initially caused by its delay. The conviction it obtained offends fundamental conceptions of justice.

ARGUMENT

I.

THE COURT BELOW CORRECTLY HELD THAT IN THE CIRUMSTANCES OF THIS CASE THE GOVERNMENT'S INEXCUSABLE DELAY IN REINSTITUTING THE CHARGES AGAINST RESPONDENT VIOLATED THE SIXTH AMENDMENT'S GUARANTEE OF A SPEEDY TRIAL

A. The government's contention, twice rejected by the court of appeals, is that the period falling between the Army's dismissal of the murder charges lodged against Dr. MacDonald in 1970 and the presentation of the same charges to the grand jury in 1974 is immaterial for purposes of applying the Sixth Amendment's guarantee of a speedy trial. Before addressing the legal arguments bearing on this claim, we point out that the ruling below is a circumscribed one, grounded on the particular facts of this case and reflecting the court's awareness that the right to a speedy trial is "necessarily relative" and "depends upon circumstances."[17]

As emphasized by Judge Murnaghan, author of the opinion below, there are few "absolutes . . . in our judicial system." The court did not hold that an interval between dismissal of a charge and reindictment for the same offense is always significant for speedy trial purposes; rather, it avoided "a simplistic rule" that the hiatus would "never count" (Pet.App.49a). We have set forth in the Statement the background and history of the proceedings and the concurrent findings adopted by the court below in 1976 and 1980. We recapitulate briefly the particular circumstances on which the court relied.

Dr. MacDonald was initially charged by the United States Army. He was arrested and held under restraint for six months. Shortly after dismissal of the military charges, the government's efforts to convict him revived. Throughout, he was subjected to "immense publicity" and "continued inquietude because the matter was not put to rest" (Pet.App.49a). Stress, anxiety, public obloquy, financial drain, and interference with respondent's life and affairs were unabated. Respondent cooperated with the authorities at every stage and made every effort to secure a prompt resolution of the renewed investigation. Nonetheless, the government pursued a course of protracted and inexcusable delay. In consequence, respondent suffered, in addition to the burdens of living under a heavy cloud of suspicion during the period that he was subjected to threat of renewed prosecution, the liability of prejudice to the conduct of his defense at trial.

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[17] The quoted language is from Beavers v. Haubert, 198 U.S. 77, 87 (1905), this Court's first decision involving the constitutional right to a speedy trial. The proposition is one which the Court has consistently followed. *See, e.g.*, Barker v. Wingo, 407 U.S. 514, 533 (1972).

B. The government relies heavily on *United States v. Marion*, 404 U.S. 307 (1971), in which the appellees asserted a Sixth Amendment claim on the ground that there was a three-year delay between the time that the authorities obtained the information upon which indictment might have been sought and the time they proceeded to do so. This Court declined "to extend the reach of the amendment to the period prior to arrest. Until this event occurs, a citizen suffers no restraints on his liberty and is not the subject of public accusation. . . ." 404 U.S. at 321. We have no quarrel with *Marion*'s holding that it takes an official act — arrest or public accusation — to engage the tenets of the Sixth Amendement.[18] While it is sometimes true, and often unavoidable, that suspicion will attach to an individual from the mere fact that a crime has been committed and is under investigation, governmental responsibility assumes a different dimension when the sovereign levels an official charge. That is true as well of other protections founded on the Bill of Rights, such as the Sixth Amendment right to counsel[19] or an individual's Fifth Amendment right to be warned, prior to custodial questioning, that he has a right to remain silent.[20]

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[18] *See also*, Dillingham v. United States, 423 U.S. 64 (1975), holding that when arrest precedes formal indictment the date of arrest marks the initiation of prosecution for purposes of applying the speedy trial provision.

[19] *See* Massiah v. United States, 377 U.S. 201 (1964); Kirby v. Illinois, 406 U.S. 682 (1972); Brewer v. Williams, 430 U.S. 387 (1977).

In short, it is not critical for present purposes that *Marion* refused to apply the speedy trial provision to the period preceding indictment of those appellees. It is significant that a contrary result would have obtained had they been arrested in advance of indictment. Arrest, the Court stated (404 U.S. at 320), is "a public act" that may carry serious consequences for the individual.

Dr. MacDonald *was* arrested and publicly charged in May 1970 and he remained under restraint until October of that year. The government's reliance on *Marion* thus comes down to the proposition that, although the speedy trial provision was undeniably engaged in May 1970, it was disengaged in October. The holding in *Marion* certainly does not embrace the latter conclusion. The ruling that the public act of accusation starts the clock hardly justifies the inference that the government can stop the clock at will, for however long it chooses, by dropping the formal charge and later reinstating it. In that situation, we submit, it is appropriate to ask, as the court of appeals did, whether the effects of the public accusation were dispelled or whether, by virtue of the government's further course of conduct, they continued unabated for periods that were both unnecessary and unreasonable.

As this Court has stated, the constitutional guarantee of speedy trial "has universally been thought essential to protect at least three basic demands of criminal justice in the Anglo-American legal system: '[1] to prevent undue and oppressive incarceration prior to trial,

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[20] Miranda v. Arizona, 384 U.S. 436 (1966).

[2] to minimize anxiety and concern accompanying public accusation, and [3] to limit the possibilities that long delay will impair the ability of an accused to defend himself.' *United States v. Ewell*, 383 U.S. 116, 120." *Smith v Hooey*, 393 U.S. 374, 377-379 (1969). While dismissal puts at least a temporary end to pretrial detention, it does not satisfy the two other protected interests in circumstances where the threat of a revived prosecution remains overhanging.

Klopfer v. North Carolina, 386 U.S. 213 (1967), a case which has marked similarities to this one, recognizes the critical importance of those interests. In Klopfer's case, the prosecutor had entered a *nolle prosequi* with the approval of the state court. Under North Carolina practice, this left open the possibility of reinstatement of the indictment at a subsequent term of court. The Supreme Court of North Carolina reasoned that indefinite postponement of the case did not implicate the speedy trial provision because Klopfer, having been discharged from custody, was free to go "whithersoever he will." 386 U.S. at 222. Pointing out that the threat of prosecution persisted and that freedom from restraint was but one of the interests at stake, this Court unanimously reversed.[21]

Judge Butzner, speaking for the court below on the first appeal of the case at bar, drew this telling comparison between Klopfer's case and Dr. MacDonald's (Op.App.15A):

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[21] Justice Harlan, concurring in the result, was of the view that the speedy trial provision of the Sixth Amendment was not applicable as such to the states. He stated that it violated the "fundamental fairness assured by the Due Process Clause" to "put a person under the cloud of an unliquidated criminal charge for an indeterminate period." 386 U.S. at 227.

After formal arrest and charge, both men contested their accusations with the inconclusive result of Klopfer's mistrial and the dismissal of the charges against MacDonald after the Article 32 proceedings. The prosecution against both men, however, could have gone forward promptly — Klopfer's by retrial and MacDonald's by court-martial if the commanding general had rejected Colonel Rock's Article 32 report or if the United States Attorney had presented the case to a grand jury. Nevertheless, neither man was held for trial. Consequently, Klopfer and MacDonald were free from imprisonment or the restraints of bail, but at all times they were subject to prosecution. Unlike defendants held pending trial, Klopfer and MacDonald were deprived of any forum in which to vindicate themselves. Most importantly, under the theory advanced by the state in *Klopfer* and by the federal government here, neither man would be safeguarded by the sixth amendment until the government, at its leisure, renewed the prosecution.

C. The government argues further that the ruling below will have an adverse impact on the administration of the criminal justice system. It states, quite correctly, that there may be various legitimate reasons for dismissing filed charges. The government may conclude that, though there was probable cause to arrest or indict, the evidence appears insufficient to prove guilt beyond a reasonable doubt. Or there may be a change of circumstances—new evidence may have come to light or a witness may become unavailable. Again, a defect in the indictment may lead the court to grant a motion to dismiss. In such situations, the argument runs, the government should be free to make a considered reassessment of its position, and not be required to proceed in a hurried atmosphere (Br., p.16).

The short answer is that nothing in the ruling below inhibits legitimate prosecutorial objectives. The court of appeals had no doubt that the Department of

Justice acted within its prerogatives in deciding to reexamine the MacDonald case after the United States Army had fully examined it and decided to dismiss the charges. It also accepted as reasonable the time consumed by reinvestigation, although that took eleven months. It did not fault the government's investigative agencies for taking an additional leisurely six months to submit a report of their findings. It said only that the government was guilty of inexcusable and irresponsible delay when, after all of that, the Department let the matter lie on the shelf for more than two additional years before deciding to present it to the grand jury. The government's plaint simply has no application to the approach taken by the court of appeals or to the ruling that it made.

Moreover, the "societal interest in providing a speedy trial" (*Barker v. Wingo,* 407 U.S. 514, 519 (1972)), as well as the "separate . . . interest of the accused" (*id.*), runs counter to the government's argument that unreasonable delay between the dismissal of an indictment and a subsequent reindictment should be ignored for Sixth Amendment purposes. Unnecessary delay between the institution of charges and their ultimate disposition, as this Court emphasized in *Barker* (at 519 *et seq.*), cannot fail to produce detrimental effects upon the administration of justice and the correctional system.[22] From the standpoint of this societal interest, it is no answer that in an occasional instance an accused might succeed in showing actual prejudice to the conduct of his defense sufficient to invoke the Due Process Clause of the Fifth Amendment.

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[22] Delay may result in a disposition contrary to the public interest or unjust to the defendant. It contributes to court congestion. It diminishes deterrence and the likelihood of rehabilitation of those who are convicted. In the case of those under some form of pretrial restraint, there are added adverse consequences.

We have stressed the fact that the court of appeals' ruling gives more than ample leeway to the pursuit of legitimate prosecutorial objectives during an interval between dismissal of charges and a subsequent reindictment. To this it should be added that petitioner's position, which would treat irresponsible and oppressive delay as immateral, provides "opportunity for abuse by the government," *United States v. Henry*, 615 F.2d 1223, 1233, n. 13 (9th Cir. 1980). "To fail to measure the speedy trial period from initial arrest would allow the government to circumvent the speedy trial requirement by successively dismissing and resinstituting a complaint or indictment for the same offense." *United States v. Avalos*, 541 F.2d 1100, 1108-09, n. 13 (5th Cir. 1976) (dismissal in order to engage in forum shopping, followed by reindictment).[23]

In a prosecution involving facts indistinguishable from those in *Avalos*, the District of Columbia circuit followed the same approach and concluded that the Sixth Amendment had been violated. *United States v. Lara*, 520 F.2d 460 (D.C.Cir. 1975).[24] The current position of other federal courts of appeal that have addressed the question supports the Fourth Circuit's view that in the dismissal-reindictment situation the period of delay is measurable from the date of arrest or inital indictment, excepting, of course, those periods in which the delay is not attributable to governmental fault. *See, United States v. Roberts,* 548 F.2d 665 (6th Cir. 1977), *cert. denied,* 431 U.S. 931 (1977);[25] *Jones v. Morris,* 590 F.2d 684 (7th Cir. 1979), *cert. denied,* 440 U.S. 965 (1979); *United States v. Henry,* 615 F.2d 1223 (9th Cir. 1980) (dictum); *United States v. Huffman,* 595 F.2d 551 (10th Cir. 1979), citing *United States v. Merrick,* 464 F.2d 1087 (10th Cir. 1972), *cert. denied,* 409 U.S. 1023 (1972).[26]

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[23] In applying the speedy trial provision, the *Avalos* court carefully distinguished between delay having a "valid investigative or prosecutorial justification" and delay resulting from neglect or a purpose to secure a tactical advantage. 541 F.2d at 1114. The views adopted in *Avalos* were confirmed in United States v. Nixon, 634 F.2d 306 (5th Cir. 1981).

[24] The government's brief argues (p. 26) that its position is supported by United States v. Bishton, 463 F.2d 887 (D.C.Cir. 1972). As discussed in our brief in opposition (pp. 13–14), the opinion in *Bishton* looked to both Fifth and Sixth Amendment criteria in considering the issue of prejudice resulting from delay in reindictment. At all events, it is plain that the same court's later decision in *Lara* adopts the view urged here by respondent. Adverting specifically to the demands of the speedy trial guarantee (520 F.2d at 464), the court stated (p. 465): "Since we hold that the decision to dismiss . . . and begin the case anew . . . was dictated by tactics and not by necessity the government must be charged with these nine months of delay."

Recent state decisions, taking note of *Marion*'s holding that arrest triggers the speedy trial guarantee, have also ruled that when an arrest and charge are followed by a dismissal and a reinstitution of the charge, "the time between indictments . . . is a delay properly chargeable to the government" and calls for a determination whether the prosecution "has justified" it. *Branch v. United States*, 372 A.2d 998, 1001 (D.C. App. 1977).[27] *State v. Black*, 587 S.W.2d 865, 874 (Mo.App.1979), observes that failure to include "the period between a dismissal and a second arrest" would allow the government "to circumvent the speedy trial requirement" and that during such period the defendant "may still suffer from the harms" inflicted by public accusation. The opinion continues (p. 875):

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[25] Contrary to the government's suggestion (Br., p.25, n. 19), the decision in *Roberts* plainly departed from the view earlier taken by the Sixth Circuit in United States v. Martin, 543 F.2d 577 (6th Cir. 1976), *cert. denied,* 429 U.S. 1050 (1977). *Roberts* held (p. 667) that the "right to a speedy trial under the Sixth Amendment" accrued on the date of the defendant's arrest, and that the twenty-six month delay from arrest to trial required examination of that constitutional issue. As the opinion makes plain (*id.*), twenty-one of the twenty-six months of delay took place between dismissal of the original charges and the defendants' reindictment on those charges.

[26] The government's survey of decisions of the courts of appeals overlooks the relevant decisions of the Seventh and Tenth circuits cited in the text. As our discussion indicates, seven circuits (the 4th, 5th, 6th, 7th, 9th, 10th and District of Columbia circuits) — not two, as suggested in the government's brief (p. 27) — currently support the position urged here by respondent. The government's position is supported by the reasoning of the Second Circuit's decision in United States v. Hillegas, 578 F.2d 453 (2d Cir. 1978), although the court did not actually decide any constitutional issue in that case.

> Using the initial arrest as the inception of the prosecutorial process and the trial as the culmination of that process, makes the entire delay the possible 'triggering mechanism', and, if further inquiry is triggered, the court necessarily will determine, under the other *Barker* factors, whether the dismissal which occurred during this period was justified or not, whether the period between dismissal and the second arrest should be weighed against the state, whether defendant suffered prejudice from the total period of time he stood accused, etc. Thus, the Court is enabled to make a rational evaluation of all relevant facts which may affect a defendant's right to a speedy trial.

Other state court decisions have recognized that failure to take account of the period between indictments would enable prosecutors to defeat the objectives served by specific state law limitations on the time for bringing an outstanding indictment to trial. *See, e.g., Thigpen v. State,* 350 So.2d 1078 (Fla.App. 1977); *State ex rel. Back v. Starke Circuit Court,* 390 N.E.2d 643 (Ind. 1979); *People v. Lee,* 44 Ill.2d 161, 254 N.E.2d 469 (1969); *People v. Wilson,* 8 N.Y.2d 391, 171 N.E.2d 310 (1960); *Commonwealth v. Whitaker,* 467 Pa. 436, 359 A.2d 174 (1976); *Smith v. State,* 168 Tenn. 265, 77 S.W.2d 450 (1935); *State v. Crawford,* 83 W.Va. 556, 98 S.E. 615 (1919).

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[27] Earlier state court decisions involving application of state constitutional and statutory speedy trial requirements to situations involving reindictment took a variety of directions. An annotation (Speedy Trial - Reindictment) in 30 ALR 2d 462 (1953) points out (p. 466 *et seq.*) that some decisions take the view that reindictment after dismissal starts a new period while others hold that the state may not extend the period by dismissal and reindictment (p. 471 *et seq.*). Although no clear-cut pattern emerges, it appears that the latter view is more frequently adopted when the dismissal was not at the instance of the defendant.

The government's brief points out (p. 31) that the Speedy Trial Act of 1974, 18 U.S.C. § 3161 *et seq.*, does not impose time limitations governing periods between dismissal of charges and their reinstitution.[28] The same is true of speedy trial statutes in the several states. The reasons are obvious. A *nolle prosequi* or a dismissal may be entered for any number of legitimate reasons, and it is wholly impractical to set fixed time limitations during which reindictment would be permissible. Reindictment will often depend upon events that are unpredictable, such as the discovery of new evidence that would warrant reopening of the case. That is precisely what Congress recognized in the passage quoted by the government (*id.*) from the legislative history: "To require a prosecutor to conform to indictment and trial time limits which were set by the filing of the original complaint in order to reopen a case on the basis of new evidence would be an insurmountable burden" (S.Rep. No. 93-1021, 93d Cong., 2d Sess. 38 (1974)). But the impracticability of dealing with the matter by fixed time limitations makes it all the more important — not less so — that defendants have the protection afforded by the constitutional guarantee. Congress was presumably aware of this when it provided in the Act (18 U.S.C. § 3173): "No provision of this chapter shall be interpreted as a bar to any claim of denial of speedy trial as required by amendment VI of the Constitution."

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[28] It is common ground between the parties that the Act has no application to this litigation. *See* 18 U.S.C. § 3163 (effective date) and opinion of the court of appeals in *MacDonald I* (Op.App.14A, n.15). It is of course relevant to future administration of the criminal law.

The government further notes (Br., at 31) that the Speedy Trial Act, in dealing with the situation where a prosecutor dismisses and subsequently reindicts on the same charge, provides for tacking a period of delay between indictment and dismissal to any delay between reindictment and trial. This, it is suggested, will adequately guard against circumvention of speedy trial requirements. But plainly this is not so. The more stringent the application of fixed time limitations to delays between indictment and trial, the greater is the incentive to avoid those limitations — to toll the running of time — by dropping the charge and later reinstating it. A prosecutor who fears that he will run afoul of time limits down the road will be tempted to take a detour by the avenue of dismissal. There can be no objection if there is a plausible reason for the dismissal and if legitimate prosecutorial objectives are thereafter pursued. But the need for protection from unreasonable delays — a need that cannot feasibly be satisfied by fixed limitations — calls imperatively for application of the flexible requirements written into the Constitution and elaborated in *Barker v. Wingo, supra*. That theme runs repeatedly through the decisions noted above.

D. We accordingly submit that faithfulness to both the fundamental constitutional purpose to protect an accused person from protracted delay and to the corresponding societal interest in the fair and prompt adminstration of criminal justice requires affirmance of the holding below. The correctness of that holding is confirmed, moreover, by the reasoned decisions of both federal and state courts.

Assuming, as we do, that respondent was under the umbrella of the speedy trial guarantee during the period taken into account by the court of appeals, the conclusion that the Sixth Amendment was violated follows inexorably. The delay was substantial and it was inexcusable. It took place notwithstanding respondent's repeated demand for prompt resolution and his unfailing cooperation with the authorities.[29] The resulting prejudice is unmistakable. Each of these propositions, as appears from the Statement above (pp. 8–15), is the subject of specific and concurrent findings made by the two panels of the court of appeals that have considered the record.

II.

THE PREJUDICE TO THE CONDUCT OF THE DEFENSE CAUSED BY THE GOVERNMENT'S DELAY RESULTED IN A DENIAL OF DUE PROCESS

A. The court of appeals, having concluded that respondent's Sixth Amendment rights were violated, found it unnecessary to decide his alternative claim of a due process violation. Although the court refrained from drawing an ultimate legal conclusion on that aspect of the case, the claim of prejudice is illuminated by the record and the court's findings. Accordingly, the matter is ripe for disposition should this Court find occasion to go beyond the Sixth Amendment issue. "[T]he prevailing party may defend a judgment on any ground which the law and record permit that would not expand the relief it has been granted," *United States v. New York Tel. Co.*, 434 U.S. 159, 166, n.8 (1977).

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[29] The government makes the remarkable suggestion (Br., pp. 36–37) that Dr. MacDonald's repeated demands for a prompt resolution were not "meaningful", although it fails to explain what more he might have done. Obviously the argument adds nothing to the government's effort to read out of the coverage of the Sixth Amendment all cases involving a sequence of indictment, dismissal, and reindictment.

Several considerations, we believe, support the view that the Court should exercise its discretion in favor of resolving the Fifth Amendment issue in the event it doubts the applicability of the Sixth. As noted, the ground is laid out by the record and findings. Secondly, the cause is already more than eleven years old. Thirdly, the government, apparently recognizing the force of these factors, has itself tendered the question.

Holding in *United States v. Marion, supra,* that the Sixth Amendment was inapplicable to the defendants in that case because the challenged delay occured before they were arrested or charged, this Court, in remanding the cause for trial, observed (404 U.S. at 326), "Events of the trial may demonstrate actual prejudice, but at the present time [defendants'] due process claims are speculative and premature." Subsequently, in *United States v. Lovasco,* 431 U.S. 783 (1977), the Court explained that such a defendant must show that the preindictment delay was unreasonable (a matter fully discussed under Point I), and that resulting prejudice to the conduct of his defense at the ensuing trial was sufficiently serious to violate "fundamental conceptions of justice" (p. 790).[30] We urge that this case meets that test.

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[30] Lovasco, the Court concluded, had failed on both counts. The delay, in the Court's view, was justified by additional investigation conducted by the government in an effort to identify other participants in the offense (431 U.S. at 796). Moreover, while Lovasco claimed prejudice resulting from the intervening death of two witnesses, he failed to state how those "witnesses would have aided the defense . . ." (*id.* at 786).

B. The government showed no motive for the crime charged to Dr. MacDonald and it had no witnesses to its occurrence. Its case rested entirely on the testimony of its investigators and technicians, through whom it attempted to piece together a theory constructed from items of physical evidence — the location of fibers from the pajama top respondent was wearing on the night of the murder; the way the pajama top was folded; the position of items of furniture; the conditions of sheets in the bedroom; the location of bloodstains. We recognize, of course, that it is not the function of this Court to evaluate the admissibility of the government's attempted demonstrations or the sufficiency of its evidence, issues raised but not reached in the court below. The court of appeals, however, did make specific findings as to the effect of the lapse of time upon the ability of the defense to deal with the prosecution's hypothetical reconstruction of the crime.

Thus it found that the technical witnesses relied largely on "scientific speculation and trial and error" (Pet. App.16a, n.7).[31] There was "almost certain memory erosion" on the part of all of these witnesses (Pet.App.14a). "The risk to MacDonald was simply too great that, in preparations *prior to the testifying* of each witness, the prosecutors helped fill lacunae of recollection" in order to assure "consistency of support for their theory of the case . . ." (Pet.App.10a; emphasis in original). The period of delay, the court concluded, "rendered it virtually impossible" for the defense to probe effectively their recollections (*id*).[32]

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[31] Dr. John I. Thornton, a University of California scientist who assisted the defense, stated (C.A.App., p.1867):

> [T]he protracted delay imposes severe constraints on the selection and execution of tests that may be applied to various aspects of the physical evidence in this case, and . . . the physical evidence is not capable in all regards of being utilized by the defense.

A finding that the defense was disabled from testing effectively the basis of the government's hypothesis is surely tantamount to a determination that respondent was severely prejudiced — especially so, where the prosecution's attempted reconstruction was the whole of its case.

C. No less important is the impact of delay upon the ability of the defense to develop its affirmative case. We refer particularly to the availability of testimony from Helena Stoeckley. When the military police arrived at the MacDonald apartment on February 17, 1970, Dr. MacDonald gave them a description of the female intruder he said had been present (blond hair, white floppy hat, boots). He also described one of the three male intruders as a black man wearing an army-type jacket with sergeant stripes. This account was sufficiently descriptive to alert a Fayetteville officer who was cooperating with the military authorities to the likelihood that Stoeckley, whom the officer knew as a drug informant, might be the woman in question. She characteristically wore a blond wig, boots and a white floppy hat, and she associated with a black male who invariably wore a military jacket with

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[32] Some examples of this are found in the testimony of Pamela Cochran and Dr. Severt Jacobson. Cochran had been a babysitter for the MacDonald children. In 1970 she told investigators that she had never seen an ice pick (one of the presumed murder weapons) in the MacDonald home. In 1979 she testified that there was an ice pick in the home (Tr. 3567-3572).

In 1970, Dr. Jacobson, one of the attending physicians, testified he did not believe that the stab wound in Dr. MacDonald's lung was self-inflicted. But, at the trial in 1979 he testified that it may have been self-inflicted (Tr. 2869-2870; 2877-2880).

E-6 stripes.[33] The officer, one Beasley, promptly confronted Stoeckley, who made the hedged admission,[34] "In my mind, it seems that I saw this thing [the murders at Fort Bragg] happen," adding, "I was heavy on mescaline" (J.A. 149).[35] Subsequently, Stoeckley was to make admissions against penal interest to six other persons, all of whom were prepared to testify to the same before the jury, but none of whom was permitted to do so.

Helena Stoeckley was the daughter of an Army officer stationed at Fort Bragg. After graduation from high school at an early age, she left home and moved into the Haymont section of Fayetteville[36] where she remained for the next several years (Tr. 5516, 5519-20).[37] She was soon heavily involved in the use of drugs (Tr. 5522 *et seq.*) and became known as a member of a "hippie" group (Tr. 5987). She also dabbled in witchcraft (Tr. 5542 *et seq.*)[38] and served as a secret drug informant for the police (J.A. 63-64, 148).

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[33] A non-comissioned E-6, like a line sergeant, wears a patch with three chevrons.

[34] Like the other Stoeckley admissions that we shall note, this was not heard by the jury but came into the record on *voir dire*. *See* pp. 38–43 *infra*.

[35] Detective Beasley also testified that Stoeckley was "the most reliable informant I ever had" (J.A. 148).

[36] She described Haymont as a "miniature version of Greenwich village" (Tr. 5520). It was frequented by soldiers, some of them absent without leave and hiding from the authorities (Tr. 5522).

[37] Stoeckley left Fayetteville in 1970, subsequent to the murder of Mrs. MacDonald and the MacDonald children, and moved to Nashville, Tennessee.

[38] One of the exercises in which she engaged involved the killing of a cat for sacrifice (Tr. 5544, 6001).

More admissions followed those made to Beasley. We summarize these extrajudicial declarations in their chronological order.[39]

Several days after the murders, Helena Stoeckley told her neighbor, William Posey, that she held the light during the commission of the crimes,[40] but that she would not kill anybody herself (J.A. 160). She also said that she remembered being seen by a policeman at the intersection near the MacDonald home shortly after the crime (*id.*).[41] She further commented on a "hobby horse thing" in one of the children's rooms, saying that it was broken and wouldn't roll (*id.*).[42]

During the months following her removal to Nashville in late 1970, Stoeckley discussed her involvement with four persons in that city (witnesses Zillioux, Underhill, Gaddis and Brisentine).

She told Jane Zillioux, a woman who had befriended her, that she could not return to Fayetteville because she was involved in murders there (J.A. 124).[43]

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[39] We note here the gist of critical admissions. The full testimony on *voir dire* appears at J.A. 121–169 and Tr. 5928 *et seq*. We discuss below (pp. 39–43) the trial judge's ruling excluding this testimony from the trial proper.

[40] Dr. MacDonald had testified that there was a flickering light on the face of the female intruder as if she were holding a candle (Tr. 6592).

[41] According to Posey (*id.*), Stoeckley named the street (Honeycutt) where she believed she had been seen. It was the same street where Sergeant Mica had made his observation of the woman in a floppy hat. See Statement, *supra*, p. 5, n.3.

[42] There was a hobby horse in the MacDonald apartment. *See* J.A. 89–91, 160.

[43] Describing the murder scene, she stated to Zillioux, "So much blood. I couldn't see or think of anything except blood . . . I asked the boys to take me home. I had to get home" (J.A. 126).

She said she had been with three males at the time (J.A. 125). She also asked Zillioux not to repeat what had been said (*id.*).[44]

Another Nashville friend, Charles Underhill, testified Stoeckley told him, while she was in a state of emotional distress, "they killed her and the two children . . . they killed the two children and her" (J.A. 135).

Stoeckley confided to James Gaddis, a Nashville police officer with whom she became acquainted and to whom she gave information concerning drug traffic, that she had witnessed the MacDonald murders and knew who had committed them (J.A. 133).[45]

CID investigator Brisentine interviewed Stoeckley in Nashville in April, 1971. She told him that she thought she had been present during the MacDonald murders but that she had not actively participated in the homicides (J.A. 138). She remarked that it had not started to rain hard until after the murders. Pressed on this point, she replied, "I have already said too much" (J.A. 141). At one stage of the interview, she offered to reveal names of the participants and the circumstances surrounding the killings if granted immunity from prosecution (J.A. 140). Brisentine also recalled that "she knew about the blood on the bed" (J.A. 144).[46]

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[44] In other remarks to Zillioux, Stoeckley stated that it was raining heavily on the night of the murders; that she was afraid her wig would be ruined; and that she had had to get rid of the wig and white boots she had been wearing, although she loved them (J.A. 124, 127).

[45] Stoeckley also stated that one of the men who was involved had a blue Ford Mustang (J.A. 132). Stoeckley had been seen by William Posey returning to her home in a blue Mustang at 4:30 a.m. on February 17, 1970. Statement, *supra*, p. 5, n.3.

[46] Stoeckley also volunteered to Brisentine the information that "the hippie element was angry with Dr. MacDonald as he would not treat them by prescribing methadone for their addiction to drugs" (J.A. 138).

During the trial Stoeckley was visited by Wendy Rouder, one of defendant's trial counsel, in the wake of a report that Stoeckley had been assaulted (Tr. 5929).[47] In the course of the ensuing conversation Stoeckley acknowledged that she had "a memory" of "standing at the couch [in the MacDonald home] holding a candle . . ." (Tr. 5937).[48] Responding to a question from Rouder as to whether she had ever lost her sense of guilt concerning the MacDonald murders, she replied, "No, what do you think I have taken all these damn drugs for?" (Tr. 5934).

It is true that Stoeckley's admission were fragmentary and that she would characteristically back away from them when pressed, at times denying recollection, on other occasions stating that she had already said too much. They are nonetheless telling. As the preceding summary demonstrates, they tally at numerous critical points with the trial testimomy of Dr. MacDonald and other witnesses, and with established facts and circumstances regarding the crime.

We have explored details of Stoeckley's admissions at some length in order to put flesh on the court of appeals' findings of prejudice and to provide a fuller sense of just how important it was to the defense that the jury hear Stoeckley's words. We emphasize, however, that the findings themselves provide ample basis for the legal conclusion that we urge this Court to draw. As set forth in the Statement, the court below found that the failure of Stoeckley to verify Dr. MacDonald's account from the witness stand "may well have been disastrous to the defense." Had she testified "as it was reasonable to expect she might have testified, the injury to the government's case would have been incalculably great." The "reason she asserted under oath was failure of memory. The government's inexcusable delay . . . cannot be eliminated as a potential — indeed a probable — cause of that memory lapse."

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[47] Stoeckley stated to Rouder that she was frightened and would like someone to stay with her (Tr. 5931).

[48] As already noted (Statement, p. 3 and page 35, n.40), Dr. MacDonald testified that he first saw the intruders in his home standing at the couch, and that there was flickering light on the face of the woman.

To be sure, as the court below stated, there were other "possible reasons." A plausible alternative explanation is that, although there may have been some failure of memory, Stoeckley's claim on the witness stand that she had no recall of the events of the critical hours was feigned. To adopt that assumption, however, would not alter the result. There is no basis upon which it can fairly be concluded that Stoeckley would have had the temerity to deny recollection of her whereabouts and of her own prior statements had the trial been promptly held. The government, bearing the responsibility for what has been found to be inexcusable delay, cannot shift to the defendant the burden of establishing with certainty what would have occurred had the government acted permissibly. Just as a defendant cannot be expected to show precisely how much a witness may have forgotten as the result of a lapse of time, *Barker v. Wingo,* 407 U.S. 514, 532 (1972), he cannot be expected to prove how fully a witness would have responded to his or her testimonial obligations if called upon years earlier.

D. The prejudice resulting from the defense's inability, at trial, to elicit from Helena Stoeckley an account of her conduct during the critical hours of February 17, 1970, would have been allayed, if not cured, had the jury heard her out-of-court admissions against penal interest. That, however, was vigorously and successfully resisted by the prosecution. We submit that the trial court's ruling excluding those admissions was contrary to both the Federal Rules of Evidence[49] and the demands of the Constitution.[50] The government, in short, succeeded in compounding, rather than relieving the prejudice it had created.

There can be no question, of course, that Stoeckley's admissions were against penal interest; they directly implicated her in the murders with which Dr. MacDonald was charged.

The ground on which the trial court excluded them was that there was insufficient indication of their trustworthiness because Stoeckley frequently equivocated and because she was a person addicted to drugs (C.A.App.

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[49] Rule 804 reads in pertinent part:

> (b) *Hearsay exceptions.* — The following are not excluded by the hearsay rule if the declarant is unavailable as a witness:
>
> * * *
>
> (3) Statement against interest. — A statement which was at the time of its making so far contrary to the declarant's pecuniary or proprietary interest, or so far tended to subject him to civil or criminal liability, or to render invalid a claim by him against another, that a reasonable man in his position would not have made the statement unless he believed it to be true. A statement tending to expose the declarant to criminal liability and offered to exculpate the accused is not admissible unless corroborating circumstances clearly indicate the trustworthiness of the statement.

Subsection (a) of the Rule provides that unavailability as a witness includes situations in which the declarant "testifies to a lack of memory of the subject matter of his statement."

[50] "Few rights are more fundamental than that of an accused to present witnesses in his own defense," Chambers v. Mississippi, 410 U.S.284, 302 (1973).

1589-91).[51] However, wariness in making a damaging admission would seem natural, rather than suggestive of falsity.[52] Nor does the fact that Stoeckley freely used drugs mean that her admissions were unworthy of belief.[53] Apart from the consideration that there may be truth in drugs as well as in wine, it appears that many of the statements were made when she was not under the influence. The basic flaw in the trial court's position, however, is that, although it purported to rely on the final sentence of Rule 804(b)(3) ("A statement tending to expose the declarant to criminal liability and offered to exculpate the accused is not admissible unless corroborating circumstances clearly indicate the trustworthiness of the statement"), neither of the reasons it gave in any way indicates a lack of corroborating circumstances. The Rule does not require that a declarant who has admitted criminal activity be a person of good habits and character or generally reliable; it asks whether corroborating circumstances support the conclusion that a particular statement against interest is likely to be true. *See,* 4 *Weinstein's Evidence,* 804-103 *et seq.* (1979).

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[51] The court of appeals found it unnecessary to make a definitive ruling on the exclusion of the Stoeckley admissions. Nonetheless, it made rather clear its disagreement with the district judge. Referring to the defendant's efforts "to supply the deficiency of Stoeckley's memory" by introducing her admissions, it commented that "the government may rue having prevented curative action" (Pet.App.12a-13a, n.6).

[52] The testimony of those who talked to Stoeckley persuasively suggests that she was torn between a sense of guilt, which periodically impelled disclosures, and a recognition of the dangers of going too far in the direction of self-incrimination. *See, e.g.*, Tr. 5934, 5936.

[53] The record indicates that Stoeckley was using drugs on one of the two days she was interviewed by CID agent Brisentine (J.A. 142). There is no evidence that she was on drugs on other occasions when she made admissions.

It should be noted that Helena Stoeckley had no apparent motive, other than her own sense of guilt, to implicate herself in the MacDonald murders. This is not the troublesome case in which a statement may be suspect because the declarant is a friend or associate of the defendant and disposed to aid him by sowing doubts as to his guilt. Dr. MacDonald and Helena Stoeckley had never laid eyes upon one another prior to February 17, 1970. This is a case, moreover, in which admissions were made promptly after the event and then repeated over the course of years. They were made to friends and acquaintances as well as to law officers. Some were spontaneous. In no instance was there any suggestion of coercion.

Finally, and most importantly, there is a remarkable degree of corroboration for Stoeckley's admissions. Dr. MacDonald gave a description of the woman who was one of the four intruders. That description was adequate to lead a local police officer directly to Stoeckley. Then and there Stoeckley implicated herself. The doctor also described the jacket worn by the black male intruder. Stoeckley associated with a black male who regularly wore such a garment. Dr. MacDonald said that when he first saw the woman, she was standing beside his living room couch and a light was flickering on her face. Stoeckley, in her admissions, spoke of standing at the couch and referred more than once to holding a light or candle for her companions. Stoeckley was away from her apartment during the critical hours between midnight and 4:30 or 5:00 a.m. No witness has ever come forward to provide an innocent explanation of her behavior during that period, although she was seen returning to her home at about 4:30 a.m. in the company of several persons. About a half hour earlier, a woman answering Stoeckley's description had been seen by a military policeman at an intersection in the vicinity of the MacDonald home. Stoeckley later commented to her neighbor that she had been observed at one of the intersecting streets named by the M.P. On one occasion when Stoeckley said that she knew the identity of the participants in the crime, she stated that one of them owned a blue Mustang. The neighbor who had observed her return to her apartment at about 4:30 a.m. said that she arrived in a blue Mustang. Stoeckley made reference to a "hobby horse thing" in the MacDonald home that wouldn't roll. There was a broken hobby horse in one of the MacDonald children's rooms.

The above may be contrasted with Judge Weinstein's authoritative statement of the requirements of corroboration under Rule 804(b)(3) (4 *Weinstein's Evidence,* 804-104, 804-105 (1979)):[54]

> The court should only ask for sufficient corroboration to "clearly" permit a reasonable man to believe that the statement might have been made in good faith and that it could be true. If, for example, the proof is undisputed that the person confessing to a shooting could not have been at the scene of the crime because he was in prison, it will be excluded. But if there is evidence that he was near the scene and had some motive or background connecting him with the crime that should suffice.

Obviously, the corroboration here is immeasurably more compelling.

While it is unnecessary to go beyond the Rule to demonstrate the egregious error of the trial court's ruling, it may be added that, in the absence of the Rule, the Constitution itself would condemn the denial of the defendant's opportunity to call the witnesses to the Stoeckley declarations. In *Chambers v. Mississippi*, 410 U.S. 284 (1973), a person other than the defendant had made out-of-court admissions, and the state court refused the defendant leave to call the witnesses who had heard them. Reversing the conviction on due process grounds, this Court emphasized (at 300-301), first, that the admissions had been made spontaneously to a close acquaintance; second, that each admission was corroborated by some other evidence in the case and that the sheer number of independent statements provided additional corroboration for each; third, that the declarant had stood to gain nothing by disclosing his role; and, finally, that the declarant was available to the state for cross-examination. Each of these factors has its counterpart here.

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[54] Judge Weinstein, it may be noted, was a member of the Advisory Committee on the Rules of Evidence.

In summary, the prejudice resulting from the government's delay and the unavailability of Helena Stoeckley was compounded, at the government's instance, by the failure of the trial court to permit curative action of the kind demanded by the Rules of Evidence and by the Constitution. The conclusion that Dr. MacDonald was denied the fundamentals of a fair trial is inescapable.[55]

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[55] Throughout this brief we have addressed the constitutional arguments tendered by petitioner. Of course, the thrust of respondent's arguments would also warrant affirmance of the judgment reversing the conviction by exercise of this Court's supervisory powers over the lower federal courts. McNabb v. United States, 318 U.S. 332, 340 (1943). ("[T]he scope of our reviewing power over convictions brought here from the federal courts is not confined to ascertainment of Constitutional validity. Judicial supervision of the administration of criminal justice in the Federal courts implies the duty of establishing and maintaining civilized standards of procedure and evidence.")

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be affirmed.

Respectfully submitted,

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No. 80-1582

In the Supreme Court of the United States

OCTOBER TERM, 1981

UNITED STATES OF AMERICA, PETITIONER

v.

JEFFREY R. MACDONALD

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

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REPLY BRIEF FOR THE UNITED STATES

1. Respondent contends (Br. 20-23) that the Speedy Trial Clause applies to a period when all charges against a person have been dismissed. He relies primarily on *Klopfer* v. *North Carolina*, 386 U.S. 213 (1967), for the proposition that the interests protected by the Speedy Trial Clause are implicated during such a period, but *Klopfer* is completely inapposite because it concerns a period when the defendant was subject to an unliquidated criminal charge.[1] As explained in our opening brief (Br. 21-

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[1] Unlike the state prosecutor in *Klopfer*, the military authorities who had "arrested" respondent had no power at all to bring him to trial, speedily or otherwise, once he had been discharged from military service. *United States ex rel. Toth* v. *Quarles*, 350 U.S. 11 (1955).

22), the dismissal of the charges against respondent dispelled the unfavorable consequences that triggered his right to a speedy resolution of those charges. Respondent points to nothing in the record that indicates that his situation after the dismissal was significantly different from that of any person who is known to be under investigation for a crime; like such a suspect, respondent was not being "held to answer" a criminal charge and had no right to a speedy trial. See *United States* v. *Marion*, 404 U.S. 307, 321 (1971).[2]

As explained in our opening brief (Br. 28-30), the rule advanced by respondent would have an adverse impact on the administration of justice. It is no answer to assert, as respondent does (Br. 23-24), that the court of appeals would not have dismissed the indictment had it been returned within the period that the court deemed necessary for a full investigation. A prosecutor cannot depend on the fact that a court will agree with him on the proper time within which to seek an indictment, and his decisions in this regard will necessarily be affected, in ways that do not further the interests of justice or of defendants, by the threat of the severe sanction of dismissal of the indictment if he does not act with sufficient expedition. See *United States* v. *Lovasco*, 431 U.S. 783, 793 (1977). The interests of justice are not served by placing these constraints on the prosecutor when no Sixth Amendment right of the defendant is implicated because he is not subject to any pending charges. Rather, the Speedy Trial Clause simply does not apply to a period when there is no charge on which the defendant can speedily be tried.[3]

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[2] Respondent's brief wholly ignores the "held to answer" portion of *Marion*'s description of the circumstances in which the Sixth Amendment speedy trial right attaches.

2. Respondent urges (Br. 16, 25-29) that a post-dismissal period when no charges are pending against a defendant must be counted for speedy trial purposes in order to prevent the prosecution from circumventing the speedy trial right by successively dismissing and reinstating an indictment. As stated in our opening brief (Br. 31-32), there is no danger of such circumvention because the entire period during

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[3] The decisions of the courts of appeals on this point are discussed in our opening brief (Br. 25-28). Those additional cases cited by respondent that involve successive charges (Br. 26), in all of which the speedy trial claim was rejected, are inapposite—either because there was no intervening period during which no charges were pending against the accused (*United States* v. *Huffman*, 595 F.2d 551, 556 (10th Cir. 1979)), or because that period was such a small portion of the total delay that it was unnecessary to determine whether it counted in the speedy trial calculation (*Jones* v. *Morris*, 590 F.2d 684 (7th Cir.), cert. denied, 440 U.S. 965 (1979); *United States* v. *Merrick*, 464 F.2d 1087 (10th Cir.), cert. denied, 409 U.S. 1023 (1972)). We also note that respondent (Br. 27) mischaracterizes as the holding of the Missouri Court of Appeals that court's summary of the holding of the court of appeals in the instant case and its quotation from another case. *State* v. *Black*, 587 S.W. 2d 865, 874 (Mo. Ct. App. 1979). In fact, the Missouri court emphatically rejected that view, stating that when the charges against a person have been dismissed, "he is under no restraint or public accusation and, thus, cannot be said to suffer from the potential prejudice or harm the right to a speedy trial protects against." *Id.* at 874 n.8. Accordingly, the court stated, constitutional protection extends to such a period "if, but only if, the cause for the delay during this period was unjustified, such as a deliberate attempt by the state to delay the trial in order to hamper the defense." *Ibid.*

which charges are pending against an accused will be counted in the speedy trial analysis. Moreover, any such intentional government action, if done to secure a tactical advantage, implicates the protections of the Fifth Amendment. In any event, respondent's contention is particularly inapposite in this case. There is no suggestion here that the post-dismissal delay was deliberate (see page 5, *infra*). The prosecutor that respondent claims has denied him a right to a speedy trial, the Justice Department, did not control the antecedent military proceedings that respondent contends irrevocably triggered his speedy trial rights. And respondent himself vigorously sought the termination of those military proceedings by dismissal of the military charges after the Article 32 hearing. Thus, this case could not be further from the specter raised by respondent of a prosecutor frustrating a defendant's desire for a speedy trial by dismissing and reinstating charges at whim.

3. Respondent argues (Br. 30-38) as an alternative ground for affirmance that, even if the Speedy Trial Clause does not apply to the period of delay between dismissal of the military charges and the return of the indictment, the delay violated his due process rights under the Fifth Amendment. As noted in our petition (Pet. 19), a lengthy delay prior to accusation may violate the Fifth Amendment, but only if it both causes actual prejudice to the defense and is the product of fundamentally unfair government conduct—for example, if the delay is an intentional device to obtain a tactical advantage over the accused. See *United States* v. *Lovasco*, *supra*, 431 U.S. at 788-796 & n.17. Respondent's claim meets neither of these requirements.

Respondent has already conceded during the earlier litigation of this case in this Court that he "does not claim that the delay in his case was the result of a deliberate attempt by the government to hamper his defense" (75-1892 Br. 44).[4] Nor does respondent suggest here that the investigative delay deviated from "elementary standards of 'fair play and decency'" (*United States* v. *Lovasco*, *supra*, 431 U.S. at 795). Rather, he simply asserts that the delay was "unreasonable" (Br. 31), apparently relying on statements made by courts below. These courts, however, attributed the portion of the delay deemed unreasonable to either "negligence" (531 F.2d at 207), "bureaucratic indifference" (Pet. App. 7a), or a "lackadaisical attitude" (*id.* at 16a)[5]—all factors that are plainly insufficient to warrant dismissal of an indictment on due process grounds. Accordingly, respondent's due process claim is without foundation.

4. a. Nor is there any basis for concluding that respondent suffered any actual prejudice as a result of the delay—an element that is indispensable to the due process claim and highly material to the speedy trial claim. On the issue of actual prejudice, respondent primarily relies (Br. 33-38) on a contention raised for the first time in his post-trial appeal—the speculative assertion that the delay was the probable cause of Helena Stoeckley's testimony at trial that she could not recall her whereabouts during the time the murders were committed. As explained in our opening brief (Br. 40-42), this assertion is without foundation. Not only does it defy common sense to believe that Stoeckley forgot about her alleged participation in the murders with the passage of time, but, as the dissenters on rehearing found (Pet. App. 46a), the record clearly establishes that Stoeckley's memory gap as to this period existed from the outset. Stoeckley herself explained at trial (J.A. 52-54) that her inability to recall her whereabouts during the early morning of February 17 was caused by her consumption of large quantities of drugs, an explanation that is fully consistent with numerous statements that she made shortly after the murders and in other conversations with acquaintances and investigators (see J.A. 11-15, 22, 24-25, 138-139, 149, 152-153).[6]

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[4] The court of appeals in *MacDonald I* specifically found that the delay was not a deliberate effort to hamper the defense (531 F.2d 196, 205-206 (1976)).

[5] We, of course, do not concede that even these descriptions are appropriate.

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[6] Respondent does concede that it is possible that Stoeckley would have given the same testimony had the trial been held without delay, but he asserts that he cannot be forced to assume the burden of establishing that the trial would have been different if it had been held earlier (Br. 38). But that is precisely the burden that the "actual prejudice" requirement places on a defendant; in order to establish a due process violation based on unfair pre-accusation delay, the defendant bears the burden of "demonstrat[ing] that the delay before indictment actually prejudiced his ability to defend himself at trial." *United States* v. *Elsbery*, 602 F.2d 1054, 1059 (2d Cir. 1977), cert. denied, 444 U.S. 994 (1979). See also *United States* v. *Lovasco, supra*, 431 U.S. at 789-790. Plainly, neither this standard, nor even the slightly more relaxed standard applicable to Sixth Amendment claims, is satisfied by respondent's speculation that, if the trial had been conducted earlier, it is possible that Stoeckley's recollection of her activities on the night of the murders would have been more complete. Indeed, even the court of appeals' findings do not assist respondent's Fifth Amendment claim because the court below found only a "substantial possibility of prejudice," which it deemed sufficient to establish a Sixth Amendment violation

Moreover, the record does not support respondent's fundamental premise that Stoeckley "admitted to presence at the scene of the crime" (Br. 7 n.6; see also Br. 17-18, 34-38). The isolated statements of Stoeckley that respondent has characterized as inculpatory state only that she *could* have been present at the murders; they are in the nature of hallucinations or acquiescence in suggestions of other persons, not specific recollections of her presence at the scene of the crime.[7] And, as pointed out in our opening brief (Br. 40-41 & n.34), these statements were accompanied by other statements disclaiming any involvement in the murders or recollection of her whereabouts during that night (J.A. 14-15, 22, 124, 130, 133, 138-141, 152-153).[8]

(Pet. App. 11a, 14a). The court of appeals implicitly conceded that there was no "actual prejudice" here (*id.* at 11a, 16a).

[7] For example, although respondent states (Br. 35) that Stoeckley told a neighbor, William Posey, that she held a light during the murders, Posey's contemporaneous testimony clearly states that he suggested to Stoeckley that she could have been present at the murders holding the light and that, in response, "she kinda * * * just nodded her head and let it go at that" (J.A. 21-22). Also, Stoeckley's 1979 statement to respondent's counsel that she "remember[ed] standing at the couch [in respondent's home] holding a candle * * *" (see Br. 37) clearly describes a hallucination because the full quote concludes: "[the candle] wasn't dripping wax. It was dripping blood" (Tr. 5937).

[8] Respondent also adopts the court of appeals' assertion (Pet. App. 10a) that he was prejudiced because the delay disabled him from effectively probing the recollection of the prosecution's witnesses (Br. 32-33). As we have previously explained (Gov't Br. 39-40), this contention is insubstantial here because the scientific evidence that formed the basis of the government's case was primarily the product of reports

b. Respondent also alleges two areas of prejudice that were not relied upon by the court of appeals. First, he quotes (Br. 32 n.31) from a 1977 statement made by Dr. John I. Thornton, a forensic scientist, that the delay "imposes severe constraints on the selection and execution of tests that may be applied to various aspects of the physical evidence in this case * * *." Respondent apparently is renewing a contention made when this case was last in this Court (see 75-1892 Resp. Br. 56, App. B6), namely, that the delay prevented the defense from performing certain blood tests and a wax drippings analysis. This contention was rebutted at length then (75-1892

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made contemporaneously with the analysis of the physical evidence. Such evidence does not diminish with the passage of time, nor does the ability of the defense to cross-examine government expert witnesses concerning their techniques and to present its own testimony challenging their conclusions. The example used by the court of appeals (Pet. App. 16a-17a n.7) illustrates this point. A government technician testified, based on her contemporaneous notes, that she had determined in 1974, by inserting probes through icepick holes in respondent's pajama top and comparing the pattern to the pattern of Colette MacDonald's stab wounds, that the garment was covering Colette's body when the holes were made (Tr.4430-4439, 4457-4474). This crucial evidence of respondent's guilt totally contradicted respondent's story that the holes resulted from his use of the garment to fend off an ice-pick-wielding attacker and that he had placed it on his wife's body after the attack. The defense, however, never challenged the technician's recollection of the manner in which she conducted the experiment. Instead, it challenged her general methodology and alleged inconsistencies between her methodology and the general appearance of the pajama top holes as observed by another government technician in 1971 (Tr. 4475-4539, 5312-5318). In addition, a defense expert contested the conclusion that the holes were made while the garment was stationary (Tr. 5150-5154, 5158-5171). Thus, the time that passed between the crime and the trial had no bearing on the defense's effort to refute this evidence.

Gov't Reply Br. 5-8), and respondent has not addressed any of the points made in the government's response. Accordingly, we will only briefly recapitulate here why this contention is insubstantial.

Dr. Thornton's main point was that at the time of respondent's indictment it would no longer have been possible to analyze bloodstains found at the crime scene for their "serum types and isoenzyme types." The blood factors with which serum protein and isoenzyme analysis are concerned, however, do not persist for more than a few weeks after the formation of the blood stains, and the techniques for performing such tests were not widely disseminated in the United States until 1972, two years after the killings. Thus, the inability to perform an isoenzyme analysis can in no way be ascribed to the delay complained of here between the submission of the final CID report to the Department of Justice in 1972 and the return of the indictment in January 1975. Moreover, an isoenzyme analysis would have been of little relevance here. The test permits discrimination between two persons having the same blood group under the accepted A-B-O genetic marker system. Here, however, respondent and the three victims each had a different A-B-O blood group (see Gov't Br. 3). Thus, there was no need to conduct a test that would permit greater discrimination within a single blood group in order to determine the identity of the probable source of each bloodstain.[9]

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[9] The Thornton affidavit acknowledged that the ability to perform A-B-O bloodtyping of bloodstains does not normally dissipate over time (75-1892 Resp. Br. App. B6). Moreover, in a second affidavit Dr. Thornton drew back from his original broad assertion, stating that "some of the evidence may not be susceptible to accurate scientific analysis due to passage of time; however, there is no way of knowing for certain if

With respect to testing the wax drippings, the government's own tests showed that some of the wax drippings found in the MacDonald apartment did not come from any identifiable source of wax in the apartment, and this fact was revealed at trial (Tr. 3838-3845). This result is consistent with respondent's story that his home was invaded by intruders carrying a candle. Respondent has never suggested what he could have hoped to establish with further testing of wax samples and thus how he conceivably was prejudiced by his inability to perform further tests on the wax.

c. In direct contrast to the court of appeals' suggestion (Pet. App. 10a; see note 8, *supra*) that respondent was prejudiced by the possibility that the prosecution filled "lacunae of recollection" to assure the consistency of its witnesses' testimony, respondent contends (Br. 33 n.32) that he was prejudiced because the trial testimony of two prosecution witnesses differed from earlier statements they had made. This contention is completely without merit.[10]

Of course, as we pointed out in our earlier reply brief in this case (75-1892 Reply Br. 4), the constitutional protection against undue prejudice to the defendant caused by delay does not guard against a strengthening of the government's affirmative case; it is the loss of evidence favorable to the defense that

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the evidence can be properly and fully evaluated until after a complete physical study of this evidence is undertaken" (C.A. App. 1637). At trial, Dr. Thornton presented expert testimony contrary to the testimony of many of the government's expert witnesses, but he did not suggest that the delay prevented the selection and execution of the necessary tests (Tr. 5128-5218).

[10] The court of appeals noted this contention but declined to address it (Pet. App. 10a n.3).

can give rise to "prejudice" in this context. Nor did the delay here in any way restrict the ability of the defense to cross-examine prosecution witnesses. When Pamela Kalin Cochran testified at trial to the presence of an icepick in respondent's home (Tr. 3559-3560), she was cross-examined at length with respect to her 1970 statement to an investigator that she did not recall seeing the icepick there, and she explained why she had subsequently been able to recall the presence of the icepick (Tr. 3567-3572). Similarly, Dr. Severt Jacobson fully explained on cross-examination the apparent discrepancy between his 1970 testimony that in his opinion a physician could not accurately assess the medical consequences of a self-inflicted pneumothorax wound (VII Art. 32 Tr. 603; see Tr. 2862-2863)[11] and his testimony at trial that "[s]tatistically he could guess [the medical consequences]" (Tr. 2863). Dr. Jacobson explained that, in light of his further training in surgery (see Tr. 2847-2849), his opinion had "changed a little bit" (Tr. 2869) because he had realized that a careful surgeon could control the depth to which he would insert a knife into himself (Tr. 2877-2878).

5. Respondent contends (Br. 38-43) that the trial court erred in excluding certain hearsay testimony. As we pointed out in our reply memorandum at the petition stage (Reply Mem. 5), this issue is not before the Court; it was not considered by the court of appeals and cannot be raised as an alternative ground for affirmance because, even if respondent's contention were correct, the remedy would not be dis-

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[11] Dr. Jacobson did not testify, as respondent asserts (Br. 33 n.32), that "he did not believe that the stab wound in [respondent's] lung was self-inflicted."

missal of the indictment. We note only that the trial court's decision was fully in accord with the language of Fed. R. Evid. 804(b)(3), and the record does not support respondent's assertion (Br. 41) that "there is a remarkable degree of corroboration" for the hearsay statements. See Pet. App. 56a-63a.

CONCLUSION

For the foregoing reasons and those stated in our opening brief, it is respectfully submitted that the judgment of the court of appeals should be reversed.

REX E. LEE
Solicitor General

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